89-516

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, Superintendent,
Mecklenburg Correctional Center,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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September 27, 1989

QUESTIONS PRESENTED

1. When a defendant has been sentenced to death under a state statute which automatically mandates a sentence of life imprisonment if the death sentence is later set aside because of constitutional error, and the sentence is later set aside for that reason, does it violate the *ex post facto* clause of the United States Constitution to resentence the defendant to death under a statute, enacted long after the defendant's initial sentence had become final, which permits capital resentencing.

2. When a defendant has been sentenced to death under a state statute which automatically mandates a sentence of life imprisonment if the death sentence is later set aside because of constitutional error, and the sentence is later set aside for that reason, does it violate the equal protection clause of the United States Constitution to resentence the defendant to death under a new statute which permits capital resentencing, when other similarly situated defendants tried under the earlier law received the mandatory sentence of life imprisonment.

3. When a state has secured a death sentence through the knowing use of false evidence, at a time when state law mandated a sentence of life imprisonment for any defendant whose death sentence was later determined to be unconstitutional, does it violate the defendant's federal right to the due process of law if the state fails for two years to disclose the known misconduct, and then seeks to resentence the defendant under a newly enacted statute which (unlike the prior law) authorizes capital resentencing.

4. When the trial record in a capital case plainly indicates that the defendant has been sentenced to death on the basis of false evidence, does it violate the defendant's federal rights to effective assistance of counsel and the due process of law if his counsel fails to discover or as-

sert those errors during the course of the defendant's direct appeal, at a time when, but for counsel's failure, the defendant's sentence would automatically have been commuted to life imprisonment.

5. When a capital sentencing jury asks the court during deliberations if a split decision will automatically result in the imposition of a sentence of life imprisonment, and the answer to that question plainly is yes, does it violate the defendant's federal right to the due process of law when the court refuses to answer the jurors' question, but instead instructs them that they must reach a unanimous verdict.

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Wilbert Lee Evans ("Evans") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

In this capital case, the United States Court of Appeals dismissed Evans' first (and only) federal habeas corpus petition, affirming the judgment of the federal district court. The opinions of the court of appeals (hereafter, the "lower court," "circuit court," or "Fourth Circuit") and the district court, which are unreported, are set forth in the Appendix ("App.") at 2a, and 17a, respectively.

JURISDICTION

The judgment of the court below was entered on August 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth separately at the end of this volume.

STATEMENT OF THE CASE

In this capital case the Commonwealth's pervasive, gross, and admitted misconduct has so far successfully deprived Evans of the sentence of life imprisonment to which he would otherwise be entitled. As we show below, Evans was sentenced to death in April 1981 on the basis of evidence that the Commonwealth later admitted was known to be false. For 23 months thereafter, the Commonwealth stonewalled, citing the false evidence in pleadings filed in four courts (including this Court), while falsely denying for a full year Evans' explicit, repeated attacks upon that evidence. Throughout this entire period, the Virginia Attorney General's office was lobbying the state legislature to enact emergency legislation permitting for the first time resentencing in capital proceedings. *On the very day that legislation was adopted* (twenty-three months after Evans' trial), the Commonwealth confessed what it had known all along—that Evans' death sentence rested on false and unconstitutional evidence.

This case presents several novel and important questions concerning whether a state which obtained a death sentence through the knowing use of false evidence, at a time when state law prohibited capital resentencing, may subject the defendant to resentencing under a new law enacted years after the defendant's first sentence had become final. (*See* Points I-III, below). This case also presents the important question, on which the lower courts have divided, of whether a capital sentencing jury should be told, in response to their specific inquiry during deliberations, that a split decision will automatically

result in a sentence of life imprisonment. (Point IV, below).

All of the facts material to Evans' claims are undisputed: they come straight from contemporaneous documents, court filings, and the sworn admissions of two Commonwealth prosecutors. Because so few of the material facts are even mentioned in the opinions below, they are set forth at length here.

1981 Conviction and Sentencing

Wilbert Evans was convicted of capital murder in April 1981, for the January 1981 shooting of an Alexandria, Virginia Deputy Sheriff.[1] At the sentencing phase of Evans' bifurcated trial, the Commonwealth's evidence consisted almost exclusively of three Exhibits (Commonwealth Exhibits 19-21) that purported to depict Evans' prior conviction record. The Exhibits showed seven separate prior convictions, for offenses in North Carolina, the state of Evans' birth. They included a conviction for "[a]ssaulting a police officer with a knife while the officer was in the performance of his duties" (App. 87a)—an offense strikingly similar to the one for which Evans had just been convicted.

Evans' court-appointed counsel, Long and Brown, raised several technical objections to the Exhibits, but did not attack their underlying validity. Out of the presence of the jury, the court reviewed each of the Exhibits, page-by-page, asking Commonwealth prosecutor John Kloch whether each of the offenses shown was in fact a conviction, and whether the convictions were for felonies or misdemeanors. (App. 31a-40a). The prosecutor said

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[1] The shooting occurred as Evans was being returned to jail after a court appearance and as he struggled with the deputy in an attempt to escape. Evans was captured less than one hour after the shooting. From the outset Evans admitted responsibility for the shooting. However, Evans has always contended, and still contends, that he never intended to kill the deputy, but that the gun fired accidentally as he and the deputy struggled to control it.

nothing to indicate that there were any flaws in the Exhibits, which were then admitted into evidence. (App. 31a-40a).

In closing argument, prosecutor Kloch repeatedly referred to Evans' prior conviction records as shown in the Exhibits, and twice referred to the offense of assaulting a police officer with a knife. (App. 41a). On April 17, 1981, the jury recommended the death penalty on the basis of the statutory aggravating factor of "future dangerousness," [2] and was discharged.

Sentencing and Appeal

On June 1, 1981, the trial court held a hearing for the imposition of sentence. At the outset the court reviewed and received into evidence a "post-sentence report" dated May 12, 1981, prepared by the Commonwealth's Probation Department. (App. 42a-45a). In a section listing Evans' prior conviction record, the report showed that the most serious conviction depicted in Commonwealth Exhibit 21 —"Assault on Officer/Affray with a Deadly Weapon"— was not a valid conviction, but had been *nolle prossed.* (App. 43a). Defense counsel told the court that they had read the report (App. 47a); but they raised no question about the contradiction between the report's account of Evans' prior record and the Commonwealth Exhibits that had been admitted into evidence at the April trial. After expressly including the report in the trial record (App. 48a-49a), the trial judge sentenced Evans to death. (App. 49a).

Long and Brown continued to represent Evans throughout his direct appeal, from June 1981 through March 1982. During that period counsel raised no objection to any of the seven prior convictions depicted in Common-

[2] The jury found that there was a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society. . . ." Va. Code § 19.2-264.2(1) (1983).

wealth Exhibits 19-21—even though the Commonwealth's Brief to the Virginia Supreme Court explicitly recited each of those convictions (App. 50a-53a), and even though the Virginia Supreme Court explicitly discussed their significance in a published opinion affirming Evans' conviction and death sentence. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816, 820, 823 (Dec. 4, 1981), *cert. denied*, 455 U.S. 1038 (1982) (*"Evans I"*). Likewise, counsel raised no challenge when the Commonwealth, in opposing Evans' certiorari petition, filed a brief which explicitly recited the seven prior convictions. (App. 54a-57a). This Court denied certiorari on March 22, 1982.

The Commonwealth's Confession of Error

Days before his scheduled execution, Evans obtained new counsel ("habeas counsel"), who discovered almost immediately that Evans' death sentence rested on false and unconstitutional evidence. Represented by his new counsel, Evans filed in April 1982 a petition for a writ of habeas corpus in the Circuit Court of Alexandria, Virginia. From April 1982, through January 1983, Evans filed four separate pleadings [3] in that court that attacked explicitly and in exacting detail the validity of the seven prior "conviction" records presented at Evans' April 1981 sentencing. Specifically, Evans asserted that there was no valid conviction for assaulting a police officer; that three of the supposed convictions were duplicative of each other; and that the others were inadmissible, because they had been obtained while Evans was without benefit of counsel. (App. 58a-74a). For a full year the Commonwealth resisted these petitions, filing pleadings in the state habeas court on July 23, 1982, and March 3, 1983, that denied each of Evans' factual allegations. (App.

[3] These included Evans' Petition for Habeas Corpus (filed April 9, 1982) (App. 58a-61a), Amended Petition for Habeas Corpus (May 5, 1982) (App. 62a-65a), Bill of Particulars (July 6, 1982) (App. 67a-70a), and Second Amended Petition (December 22, 1982) (App. 72a-74a).

83a-86a). The Commonwealth's denials were signed by Assistant Attorney General Jerry P. Slonaker.

As discussed below, these denials had a devastating impact on Evans' case because, at the time they were made, Virginia law prohibited capital resentencing. As the court below correctly noted, "[p]rior to [March 28, 1983], if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." (App. 5a). That point was settled at least as early as October 1981, when the Virginia Supreme Court authoritatively construed the state's capital sentencing statute in *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (Oct. 16, 1981)—a decision issued by the same court that decided Evans' direct appeal six weeks later.[4]

During the entire year that Evans' state habeas petition was pending, representatives of the Virginia Attorney General, including Assistant Attorney General Slonaker, lobbied the Virginia legislature to overrule *Patterson* and allow capital resentencing. On March 28, 1983, Virginia adopted the amendment proposed by the Attorney General, which, effective immediately, permitted capital resentencing. *On that same day* Slonaker informed Evans' counsel that the Commonwealth intended to confess error in the Evans case. The Commonwealth's written confession of error, dated April 12, 1983, ad-

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[4] The *Patterson* decision was based on Virginia's then-existing capital sentencing statute, under which only the same jury that found a capital defendant guilty could fix his punishment. Because the jury in *Patterson* had been tainted by constitutional error, it could not be reconvened to resentence the defendant. And because Virginia had no statute authorizing resentencing before a different jury, the Virginia Supreme Court concluded that Patterson's death sentence had to be reduced automatically to life imprisonment. 283 S.E.2d at 216. *See also Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117 (1984), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*).

mitted to each of the errors that Evans had begun alleging a year earlier: that three of the seven convictions were duplicative; that there was no valid conviction for assaulting a police officer; and that the other convictions were uncounselled. The written confession asserted, however, that these errors were made "unbeknownst to the prosecution." (App. 88a). Subsequent events proved that assertion false.

By order dated May 2, 1983, the court vacated Evans' death sentence. Thereafter, the Commonwealth sought resentencing under Virginia's newly amended capital sentencing statute. When Evans objected, the state trial court held an evidentiary hearing, in September 1983, to determine whether resentencing was permissible.

At the hearing, two Commonwealth prosecutors admitted under oath to a series of actions that for two years effectively deceived four courts (including this Court) about the true facts surrounding Evans' first death sentence. Far from claiming ignorance of the errors in the prior conviction records (as the Commonwealth's confession of error had suggested), the trial prosecutor (Kloch) admitted that he had known as early as February 1981—two months *before the trial*—that three of the seven convictions were duplicative, and that there was no valid "conviction" for assault on a police officer. (App. 92a-95a). Kloch's sworn admissions were corroborated by a written report, prepared by Kloch's assistant and given to Kloch in February 1981, which plainly identified the errors in Evans' supposed conviction records. (App. 29a-30a). In defending his conduct at trial, Kloch claimed that in an off-the-record discussion—held after the bench conference with the judge and after the tainted evidence had gone to the jury, but before final arguments—Kloch told defense counsel about the errors, but that counsel had failed to object.[5] Kloch had no ex-

[5] (App. 95a-96a, 100a-103a). Kloch claimed that he believed defense counsel had some "tactical" reason for failing to object. Even if this testimony were plausible, it is irrelevant. By Kloch's

planation, however, for his decision to proffer the false conviction records in the first place, or for his failure to inform either the trial court or jury about the known errors. (App. 96a, 100a).

Although Kloch's office did not represent the Commonwealth in the direct appeal, Kloch testified that he had read an "advance sheet" copy of the Virginia Supreme Court's December 1981 opinion—which explicitly recited and relied on the seven supposed convictions, with particular emphasis on the one concerning a police officer. *See Evans I*, 284 S.E.2d at 820, 823. By his own admission, Kloch did nothing to correct the court's unwitting reliance on that false evidence. (App. 97a-98a).

Slonaker was the other key witness at the September 1983 hearing. Although he denied making any conscious effort to delay the confession of error to achieve a tactical advantage, he made several crucial admissions that are nowhere discussed in the opinion below. First, Slonaker admitted that on or before January 1983, he and Kloch had met to discuss Evans' case. At that meeting, Kloch told Slonaker that Evans' death sentence had been obtained by the knowing use of false evidence.[6]

Second, Slonaker acknowledged that in January 1983—two months before the law was amended, and three months before the confession of error—he had received letters directly from the clerk of the court in North Carolina confirming that the "conviction" records proffered by the Commonwealth at the 1981 trial were false and misleading. (App. 77a-82a, 117a). It is undisputed

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own account, his supposed disclosure to defense counsel occurred *after* the tainted Exhibits had gone to the jury and thus, after the damage had been done. (App. 100a-103a). In any event, both of Evans' defense counsel denied under oath that Kloch had ever made such a disclosure (App. 103a-110a), and no court has ever resolved that disputed issue of fact. *See Evans II*, 323 S.E.2d at 120.

[6] Both Slonaker and Kloch testified about this meeting. (App. 115a-117a (Slonaker), 98a-99a (Kloch)).

that six weeks after receiving these letters, and after his face-to-face meeting with Kloch, Slonaker filed an Amended Answer in the state habeas court again denying the allegations in Evans' state habeas petitions—allegations which by that point Slonaker knew were true. (App. 83a-86a).

Finally, Slonaker admitted that throughout this same period—while Evans was pressing his appeal and state habeas petition, and Slonaker was receiving reports that Evans' allegations were accurate—Slonaker had been actively involved in lobbying the Virginia legislature to adopt emergency legislation permitting capital resentencing. By his own admission, Slonaker had written a memorandum in September 1982 urging adoption of the measure (App. 113a); helped draft and revise the actual language of the proposed amendment (App. 113a); and appeared twice before legislative committees in support of it, in January and February 1983. (App. 113a-114a).

At the close of the September 1983 hearing, Judge Wright ruled from the bench, permitting resentencing under the amended statute. (App. 117a). That ruling was followed by a terse order, which the court below characterized as "findings of fact." (App. 118a-120a).

1984 Resentencing

A resentencing hearing was held on January 31-February 3, 1984. During the course of its deliberations, the resentencing jury asked the court whether "a split decision automatically become[s] life." (App. 122a). As described below, over defense counsel's objection, the court responded in a way that deliberately left the question unanswered. *See* pp. 26-27, *infra*. The jury then recommended the death sentence, based on the statutory aggravating factor of "future dangerousness."[7] On March

[7] Four months later Evans was involved in an event that is flatly inconsistent with any finding that he poses a "future danger" to society or deserves the death penalty. In May 1984, six death row inmates escaped from Mecklenburg Correctional Center (where

7, 1984, the court imposed sentence of death. The Supreme Court of Virginia affirmed, and this Court denied certiorari. *Evans II*.[8]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF *DOBBERT v. FLORIDA*, WHICH THE FOURTH CIRCUIT MISCONSTRUED TO REACH AN UNPRECEDENTED RESULT.

The circuit court's entire justification for rejecting Evans' *ex post facto* and equal protection claims was a mistaken construction of this Court's decision in *Dobbert v. Florida*, 432 U.S. 282 (1977). Although *Dobbert* arose out of peculiar factual circumstances that have seldom if ever been repeated, the lower courts have struggled for more than a decade to apply *Dobbert*'s principles to a wide array of other circumstances. The result has been a series of confusing and inconsistent decisions in both federal and state courts.[9] No case more plainly illustrates

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Evans was incarcerated), after holding fourteen prison guards hostage. Despite extreme pressure to join the escape, or simply to yield to events, Evans prevented violence and helped those who had been taken hostage. Though unarmed, he placed himself between the heavily armed escapees and the hostages, intervening on the hostages' behalf, urging the escapees to remain calm and nonviolent, and helping the hostages when he could. The fourteen hostages credit Evans with saving their lives, and one female hostage credits him with preventing her rape. (App. 124a-129a).

[8] Thereafter, Evans exhausted the remaining claims in his state habeas petition; the Virginia Supreme Court denied review of those claims in a two-sentence order, *Evans v. Bair*, No. 860831 (Feb. 26, 1987), and this Court denied certiorari. 483 U.S. 1010 (1987).

[9] The decision below squarely conflicts with the result, if not the reasoning, of another federal circuit on the same issue. *See Coleman v. McCormick*, 874 F.2d 1280, 1286 & n.7 (9th Cir. 1989) (en banc) (distinguishing *Dobbert*; due process violated by retroactive application of new capital sentencing statute to defendant whose sentence under earlier statute had been set aside as unconstitutional). *But cf. Coleman v. Saffle*, 869 F.2d 1377, 1385-87

that confusion than this one, or more clearly demonstrates the need for this Court to revisit and clarify the law of *ex post facto*. Until this case, no federal court had extended *Dobbert* to authorize the retroactive application of a statute enacted years after the defendant's crime, sentencing, and direct appeal had become final, and thereby retroactively deprive him of a complete statutory defense to a capital sentencing. Under the banner of encouraging state legislatures to reform their criminal laws (*see* App. 8a), the lower court made a wholesale revision of the *ex post facto* and equal protection clauses, which plainly misconstrues *Dobbert* and ignores other applicable authority.

(10th Cir. 1989) (due process not violated by retroactive application of new capital sentencing principles governing weighing of aggravating and mitigating factors; due process analysis should be identical to *ex post facto* analysis in *Dobbert*). The state courts have cited *Dobbert* as both prohibiting retroactive application of new sentencing statutes, and as authorizing it. *Compare Thigpen v. Thigpen*, 541 So. 2d 465, 467 (Ala. 1989) (resentencing under new capital statute violates *ex post facto; Dobbert* distinguished), *State v. Rodgers*, 242 S.E.2d 215, 217-18 (S.C. 1978) (distinguishing *Dobbert*; resentencing even under ameliorative statute barred, where defendant had already been tried and convicted under earlier law), and *Meller v. State*, 581 P.2d 3, 4 n.3 (Nev. 1978) (per curiam) (same); *with Klasing v. State*, 771 S.W.2d 684, 686-87 (Tex. Ct. App. 1989) (no *ex post facto* violation from retroactive application of new law permitting resentencing) and *State v. Norton*, 675 P.2d 577, 585-88 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) (same). Even within the same jurisdiction, there has been repeated, sharp disagreement over the proper construction of *Dobbert*. *Compare Dutton v. Dixon*, 757 P.2d 376, 380 (Okla. Crim. App. 1988) (distinguishing *Dobbert; ex post facto* clause prohibits resentencing) *with Cartwright v. State*, 1989 Okla. Crim. App. LEXIS 45 (July 31, 1989) (citing *Dobbert* as basis for overruling *Dutton v. Dixon*). *Compare State v. Creekpaum*, 732 P.2d 557, 561-68 (Alaska App. 1987) (distinguishing *Dobbert; ex post facto* clause violated by retroactive extension of statute of limitations before prosecution had become time-barred) *with State v. Creekpaum*, 753 P.2d 1139, 1141-42 (Alaska 1988) (taking contrary view of *Dobbert* and reversing lower court).

A. Resentencing Evans to Death Under Virginia's Amended Capital Statute Violated the *Ex Post Facto* Clause.

As the court below explicitly conceded, "[p]rior to th[e] amendment [of March 28, 1983], if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." (App. 5a). The only death sentence that the Commonwealth secured against Evans prior to March 1983 was, by the Commonwealth's own admission, unconstitutional and could not "be sustained." (App. 87a). Thus, as the lower court's opinion explicitly recognizes, if Evans' death sentence had been vacated at any time prior to March 1983, he would have been entitled to an automatic sentence of life imprisonment, and could have successfully asserted an absolute defense against any effort by the state to resentence him to death. The issue presented here is whether Virginia violated the *ex post facto* clause when it retroactively applied its amended capital sentencing statute—enacted more than two years after the offense, and a full year after Evans' appeal was final—to deprive Evans of the automatic sentence of life imprisonment provided by the earlier law.

The lower court's effort to squeeze this case into the *Dobbert* mold ignores *Dobbert*'s facts, holding, and express language. The facts in *Dobbert* bear no resemblance to the ones here. The defendant in *Dobbert* committed his offense at a time when Florida had in place a capital sentencing statute which was manifestly unconstitutional, because it provided an automatic presumption in favor of death unless a majority of the sentencing jury recommended mercy. By the time of Dobbert's trial, Florida had replaced its unconstitutional sentencing statute with a new statute that provided the defendant with a full panoply of procedural rights. Dobbert was tried and sentenced to death under the new, ameliorative, constitutional sentencing statute. His *ex post facto* chal-

lenge to that sentence stood both the law and common sense on its head: though sentenced to death under the constitutional law, he claimed that the result would have been different had he been tried under its unconstitutional and draconian predecessor. In rejecting that claim, the Court did no more than recognize that a defendant has no constitutional right to be sentenced under an unconstitutional statute. Moreover, since Dobbert had never been tried under the old statute, his prediction about how the jury might have voted if that law had been in place was rank "speculation." 432 U.S. at 294.

Evans' case is manifestly distinguishable from *Dobbert* in ways that the lower court did not address. Evans was tried under a law that is conceded to be constitutional; that was in place at every phase of his criminal proceeding, from indictment through direct appeal and beyond; and that plainly prohibited resentencing if the Commonwealth committed error, as indeed it did. Moreover, Virginia's new statute, unlike the one in *Dobbert*, was anything but ameliorative, as the district court recognized. (App. 20a (n.1)). Its sole purpose was to provide the state additional, repetitive opportunities, foreclosed under the earlier law, to secure death sentences against capital defendants.

Ignoring these factual distinctions, the lower court claims that in this case, as in *Dobbert*, "*ex post facto* concerns were satisfied because the applicable statute when [the defendant] committed murder warned him of the penalty . . . prescribed for first-degree murder." (App. 6a). Once that warning had been given, the court asserts, the state had free rein to make any retroactive changes it wished, as long as they did not increase the quantum of punishment or change the proof necessary to convict. (App. 6a-8a). Though supposedly based on *Dobbert*, these conclusions go far beyond the narrow facts of that case and virtually read the *ex post facto* clause out of existence —particularly for capital crimes where, by definition, the state can do nothing to increase the quantum of punishment.

The lower court's construction of *Dobbert* also unnecessarily pits that case against numerous decisions of this and other courts which have struck down as *ex post facto* laws that neither increased the quantum of punishment associated with the offense, nor altered any of the statutory elements of proof.[10] These include laws retroactively reducing the size of the petit jury in criminal cases;[11] permitting criminal proceedings to commence by information, rather than indictment;[12] and altering the standard for the admission of impeachment evidence in criminal trials.[13] Moreover, in a particularly relevant line of cases dealing with extensions of statutes of limitation for criminal offenses, courts have uniformly recog-

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[10] The circuit court's construction of *Dobbert* is plainly at odds with this Court's decision in *Kring v. Missouri*, 107 U.S. 221 (1883). The circuit court is inexplicably mistaken in suggesting that Kring's case can be distinguished from Evans' because Kring was "on notice" at the time of the offense that "he [could] never be subjected to a death sentence . . . ." (App. 7a). To the contrary, Kring had been charged from the outset with capital murder, and indeed, had earlier been sentenced to hang. 107 U.S. at 221-22, 236. When that sentence was set aside, Kring pled guilty to a lesser offense; and when the plea was set aside, the State sought to amend its law to strip Kring of his absolute defense to another capital sentencing. *Id.* at 229, 234. This Court held that Missouri's effort retroactively to abrogate Kring's defense violated the *ex post facto* clause, just as it does here.

Unlike the circuit court, the district court correctly recognized that respondent's construction of *Dobbert* cannot be reconciled with *Kring*. The district court's solution, however, was to declare that *Kring* had been "modified or overruled" by *Dobbert*. (App. 22a (n.4)). That is plainly wrong: this Court cited *Kring* with approval in a case decided four years *after Dobbert*. *See Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981).

[11] *Thompson v. Utah*, 170 U.S. 343, 355 (1898). *See United States v. Juvenile Male*, 819 F.2d 468, 471 (4th Cir. 1987) (citing *Thompson* with approval).

[12] *Mafnas v. Government of Guam*, 228 F.2d 283, 285-86 (9th Cir. 1955).

[13] *United States v. Henson*, 486 F.2d 1292, 1308 (D.C. Cir. 1973) (en banc).

nized that once a statutory period has lapsed, the state may not prosecute a potential defendant for the offense under a new, longer statutory period.[14] In those cases, like this one, the state has sought not to change the elements of the crime or increase the quantum of punishment associated with it, but rather to enlarge the class of potential defendants to include those for whom prosecution would otherwise be time-barred. The cases stand for the precise proposition at issue here: a state violates the federal *ex post facto* clause when it retroactively seeks to strip from the defendant a complete statutory defense to the crime (or in this case, the resentencing). The lower court's unprecedented construction of the *ex post facto* clause casts doubt on the continued validity of these cases and adds significantly to the confusion in this already difficult area of the law. This Court should grant certiorari to clarify and resolve the uncertainty created by the lower court's opinion.

B. Resentencing Evans to Death Under Virginia's Amended Capital Statute Violated the Equal Protection Clause.

Because "death is different," this Court has long insisted that the procedures used to impose it produce reliable results, and that the state courts "ensure that

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[14] That principle was articulated by Judge Learned Hand in *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928), in which the court permitted prosecution under the amended statute because it had been adopted *before* the initial statutory period had expired. *Accord United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Clements v. United States*, 266 F.2d 397, 399 & n.4 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); *United States v. Fraidin*, 63 F. Supp. 271, 279 (D. Md. 1945). However, once a defense to prosecution exists because the statutory period has lapsed, the state may not prosecute the potential defendant for the offense under a new, longer statutory period. *See, e.g., Sobiek v. Superior Court*, 28 Cal. App. 3d 846, 106 Cal. Rptr. 516, 518 (1972); *State v. Edwards*, 701 P.2d 508 (Wash. 1985) (en banc). Although those cases were extensively discussed in the briefs below, the circuit court did not mention them.

similar results are reached in similar cases." [15] Precisely the opposite happened here: two strikingly similar cases produced dramatically different results. Although Patterson and Evans both received flawed death sentences under the same law in 1981, and their cases moved virtually in tandem through the Virginia courts, the results could not have been more different: Patterson was sentenced to an automatic term of life, while Evans was forced to face the renewed prospect of death. *See* note 4, *supra*. The sole reason for this disparate result was one illegitimate circumstance: each of the four courts (including this Court) that reviewed Evans' case in the two years after his trial was materially misled by the Commonwealth's failure to disclose that Evans' death sentence rested on false and unconstitutional evidence. Although the prosecution knew of the false evidence from the moment it was offered, and Evans squarely challenged that evidence in the state habeas proceeding a full year before Virginia's capital sentencing amendment was adopted, the courts were denied the truth about Evans' sentence until the new amendment was in place. No rational or legitimate purpose is served by a legislative classification that distinguishes two otherwise identical cases solely on that basis.

The lower court's cryptic rejection of Evans' equal protection claim is premised, once again, on a misreading of *Dobbert*. Contrary to the Fourth Circuit's claim (App. 9a), the line-drawing authorized by *Dobbert* provides no justification for what occurred here. In *Dobbert*, the Court upheld a death sentence obtained under a constitutional penalty statute enacted after commission of the crime *but before trial*. Although permitting the line to be drawn at that point because "the new statute . . . was in effect at the time of [Dobbert's] trial" and sentencing, 432 U.S. at 301, the Court stated: "Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process

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[15] *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (citation omitted).

as to be governed solely by the old statute . . . and those whose cases involved acts which could properly subject them to punishment under the new statute." *Id.*

Here, by contrast, Virginia did not apply the law in effect at the time of Evans' trial and sentence, or even in effect at the time of Evans' direct appeal and state habeas petition. Rather, it applied a law passed two years *after* Evans' trial, and more than a year after his death sentence had become final. By that time, Evans' case had not only "progressed sufficiently far in the legal process as to be governed solely by the old statute," *id.*, it could not possibly have progressed any farther. Pushing *Dobbert*'s line to that point makes any line-drawing irrational and meaningless; a line drawn there includes everything and excludes nothing.

The lower court's "line-drawing" ignored two other crucial distinctions between this case and *Dobbert*. First, not only had Dobbert never been sentenced under the old law, but he *could not* have been sentenced under it, because it was unconstitutional. By contrast, Virginia's earlier law was plainly constitutional and had actually been applied to Evans' case as it progressed through every stage of the judicial system, from trial, through direct appeal, through certiorari, and through the state habeas system.

Finally, although the timing of events in Dobbert's case was completely fortuitous, here it was not. Whatever the state's motives in waiting twenty-three months before confessing error, two things are certain: the state knew that its own sentencing evidence was false from the moment that evidence was offered; and the state exercised exclusive control over when and how those errors would be disclosed. Under those circumstances, it is unconscionable to conclude that Patterson and Evans should be treated differently under the equal protection clause.[16]

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[16] The highest courts of at least two other states have held that the equal protection clause prohibits the sort of "line-drawing" that occurred here. *See Lee v. State*, 340 So. 2d 474 (Fla. 1976) (per

II. THE LOWER COURT'S REJECTION OF EVANS' DUE PROCESS CLAIM RESTS ON A FUNDAMENTAL MISCONCEPTION, WHICH THIS COURT SHOULD CORRECT, ABOUT THE LEVEL OF SCRUTINY REQUIRED IN FEDERAL HABEAS CORPUS REVIEW.

As this Court has observed, for more than a century federal habeas corpus review "has been a source of friction between state and federal courts . . . ." [17] In recent years, the Court has repeatedly revisited the thorny issues of federalism raised by the federal habeas statute, which requires the courts of one sovereign to review the decisions of another. The Court has on occasion found it necessary to admonish the lower federal courts against substituting their own view of the merits for that of the state judge who heard the evidence and saw the witnesses firsthand.[18]

That salutary principle has been utterly misunderstood and misapplied in this case. Here, the lower federal courts did more than defer to the state factfinder: they abdicated their statutory responsibility to provide *any* meaningful review of the state court's decision. This case vividly illustrates that the lower courts still do not know how to strike the appropriate balance between deference to state factfinding and the federal mandate to

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curiam) (no legitimate state objective advanced by sentencing to death one defendant who exercised his appellate rights while permitting all other similarly situated defendants to live). *Commonwealth v. Story*, 440 A.2d 488, 491-92 (Pa. 1981) (same). *See also Commonwealth v. Crenshaw*, 470 A.2d 451, 454-55 (Pa. 1983) (death sentence vacated where, but for extraordinary delay of almost three years in bringing defendant to trial, defendant would have been tried under old law and received life sentence). Those decisions were discussed extensively in the briefs below, but are unmentioned in the lower court's opinion.

[17] *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (*"Sumner I"*).

[18] *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 432-34 (1983); *Sumner v. Mata*, 455 U.S. 591, 596-98 (1982) (per curiam) (*"Sumner II"*); *Sumner I*, 449 U.S. at 446-51.

review. This Court should grant certiorari both to provide further guidance on that important issue and to correct a result that is demonstrably unjust.

The lower court is plainly and completely wrong in asserting—without citing a shred of the record evidence—that "the state habeas courts found the Commonwealth acted in good faith." (App. 12a (n.1); *see also* App. 10a). Equally groundless, and even more inexplicable, is the suggestion that there are findings of fact concerning the "'credibility of witnesses whose demeanor has been observed by the state trial court . . . .'"[19] In truth, the state habeas judge who heard two Commonwealth prosecutors admit under oath to the knowing use of false evidence in a capital case, and other actions that effectively concealed that wrongdoing for two years, made no findings of fact at all. Rather, his entire explanation for rejecting Evans' due process claim is confined to two sentences of an order drafted by the Commonwealth:

> [Evans] failed to prove by a preponderance of the evidence that the prosecution engaged in such misconduct or tactics of a nature which should preclude the Commonwealth from again seeking the death penalty in this case;
>
> and . . . .
>
> [T]he evidence fails to prove by a preponderance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of [Evans'] petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant . . . . (App. 118a-119a).[20]

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[19] (App. 11a) (quoting *Marshall v. Lonberger*, 459 U.S. at 434).

[20] That order was based on the court's oral ruling from the bench, made immediately at the close of the evidence and without benefit of post-trial briefs. (App. 117a).

To be sure, the Virginia Supreme Court provided some of the missing analysis in *Evans II*. But that opinion was based on a cold review of the written record and is no substitute for the fact-finding that should have been made by the judge who heard the live testimony of the witnesses. *But cf. Sumner I*, 449 U.S. at 541-

However "elusive" the distinction may sometimes be between findings of fact and legal conclusions,[21] the state court order at issue here is at the far end of the spectrum. It bears no resemblance to the findings of " 'basic, primary, or historical facts' " to which the presumption of correctness was intended to apply.[22] It tells nothing whatsoever about the court's view of what happened, when, or under what circumstances; which witnesses were credible, and which were not; what other evidence was probative, and what was not; and what other factors or events were considered and why. Indeed, the order sheds no light even on the *legal* standards that the court applied in reaching the result. On its face the order is nothing more than a cryptic summary ruling, which is certainly not a finding of fact, and may not even be a conclusion of law. The lower court's deference to this supposed "finding" fundamentally misconceives the mandate of federal courts in habeas review.[23]

42, 546-47 (presumption of correctness applies to state appellate court findings where issue was never presented to trial judge and thus, the *only* state findings were necessarily made by appellate court). In any event, far from finding good faith, the Virginia Supreme Court castigated the prosecutor for the "indifferent, careless manner" in which he had handled the evidence, and particularly, for proffering evidence that he knew was false. *Evans II*, 323 So. 2d at 120.

[21] *See Miller v. Fenton*, 474 U.S. 104, 113 (1985).

[22] *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) (citations omitted). *See also Sumner II*, 455 U.S. at 597.

[23] Citing *Marshall v. Lonberger*, 459 U.S. at 433-34, the Commonwealth argued below that the state habeas judge's order rejecting Evans' due process claim was an "implicit" finding that the Commonwealth had acted in good faith. There is nothing in the opinion below to suggest that the circuit court accepted that argument, which in any event, is mistaken. In *Marshall* the issue resolved by the state trial court was a simple, narrow question of fact that turned entirely on whether the court believed, or disbelieved, the defendant's story; thus, the trial court's rejection of the defendant's claim necessarily implied a finding against the defendant's credibility. Here the factual record is complex, and

Even if this record did include some "findings of fact," the lower court completely failed to exercise its statutory responsibility to determine whether they were "fairly support[ed]" by the record "considered as a whole." 28 U.S.C. § 2254(d) (1982). The circuit court's examination of the record begins and ends with the prosecutors' self-serving declarations that they acted in good faith. Whether sincere or not, those statements are irrelevant to the issues presented.[24] What the circuit court failed to consider, or even mention, is the *conduct* that the prosecutors admitted occurred. Thus, prosecutor Kloch acknowledged that he knew the conviction records were false two months before trial; that he knowingly proffered them into evidence without mentioning their flaws to judge or jury; and that when he learned in December 1981 that the Virginia Supreme Court had explicitly relied on the false evidence, he did nothing to correct the court's unwitting error. (App. 92a-100a).

Likewise, the undisputed record evidence is that by January 1983—two months before the new sentencing law came into effect—Assistant Attorney General Slonaker had proof positive that Evans' claims of error in the state habeas petitions were accurate. Slonaker and Kloch both testified without contradiction that by January 1983 Kloch had told Slonaker in a face-to-face meeting that he knew prior to the trial that several of the seven convictions were duplicative, and that another was non-existent.[25] Moreover, the undisputed evidence established that by January 24, 1983, Slonaker had received written confirmation directly from the clerk of the court

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the state trial judge gave no clue about his reasons for rejecting Evans' claims.

[24] *Cf. Arizona v. Youngblood*, 109 S. Ct. 333, 337 (1988) ("[T]he good or bad faith of the State [is] irrelevant when the State fails to disclose to the defendant material exculpatory evidence.").

[25] *See* note 6, *supra*. At that meeting the two men even discussed whether it would be "easier" to seek resentencing of Evans if the capital sentencing amendment then pending in the Virginia legislature were adopted. (App. 99a).

in North Carolina that each of Evans' assertions was accurate. (App. 77a-82a). Whatever Slonaker's subjective estimate of his own good intentions, one thing is certain: he was obligated promptly to disclose the known errors and to correct the state's July 1982 Answer, which was materially inaccurate. What Slonaker did instead was to perpetuate the wrongdoing by filing, two months later (on March 3, 1983), an Amended Answer that continued to deny the factual allegations in Evans' petition. (App. 83a-86a).

Finally, the lower court erred in concluding that the "traditional remedy" of capital resentencing removed the prejudice Evans had suffered from the Commonwealth's two-year delay in confessing error. The plain fact is that if the Commonwealth had disclosed the known errors and misconduct at any time prior to March 1983, as it was obligated to do, Evans would not now be facing death. Thus, in the circumstances of this case, resentencing could not remove the prejudice, *because resentencing itself was the prejudice.* But for the Commonwealth's two-year delay in disclosing the truth, there would have been no resentencing, and hence, no death sentence. Under these circumstances, Evans was entitled to a more "drastic remedy" than resentencing.[26] His sentence should be commuted to life imprisonment, as the earlier law required.

III. THE DECISION BELOW EVISCERATES THE IMPORTANT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

In *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), this Court held that "the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant effective assistance of counsel on [his] appeal." Since *Evitts* the

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[26] *See United States v. Morrison*, 449 U.S. 361, 365-66 & n.2 (1981) ("drastic remedy" appropriate where there is "continuing prejudice which . . . could not be remedied by a new trial," or where there has been a "pattern of recurring violations" or "lawlessness" by the state).

Court has made plain that claims of ineffective assistance of counsel on appeal should be judged by the criteria set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and has recognized that this right "may in a particular case, be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial."[27] The circuit court recognized these standards in principle, but not in practice. (*See* App. 14a-15a). This Court should grant certiorari to provide needed guidance concerning the proper application of this important constitutional right.

The circuit court's recitation of the record evidence concerning Evans' appeal ignores the single most striking fact, which is uncontested: although defense counsel represented Evans continuously from the moment of his arrest (January 1981) through the denial of certiorari on his direct appeal (March 1982), counsel somehow failed to do the cardinal task of any lawyer representing the defendant in a capital sentencing—they failed accurately to determine their client's prior conviction record. That failure is particularly egregious in light of the Virginia capital sentencing statute's prominent emphasis on the prior conviction record of the accused,[28] counsel's lengthy representation of Evans, the ease with which the prosecution accurately determined the same information,[29]

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[27] *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (citations omitted).

[28] Virginia's sentencing statute explicitly identifies "the past criminal record of convictions of the defendant" as the principal factor to be considered by the capital sentencing jury. Va. Code § 19.2-264.2(1) (1983).

[29] It is undisputed that two months before trial, a junior lawyer from the prosecutor's office correctly discovered Evans' true record after a brief trip to North Carolina. (*See* App. 29a-30a). Evans' habeas counsel, Mr. Shapiro, discovered the same information almost immediately after beginning the representation and without leaving Virginia.

and Evans' own efforts to alert counsel to the errors in the Commonwealth's Exhibits.[30]

The circuit court's rejection of Evans' claim rests on three crucial errors. First, the court errs in suggesting that because counsel traveled to North Carolina to investigate Evans' prior conviction record, "counsel's performance was reasonable." (App. 14a). Under *Strickland* counsel must do more than perform; they must perform *effectively*. In a capital case, counsel's utter failure to ascertain their client's conviction record cannot possibly be deemed "effective" assistance.

Second, the lower court inexplicably errs in asserting that "[t]he errors in the certified conviction records introduced at trial could only be shown by going outside the trial record." (App. 15a). That conclusion is flatly at odds with the court's own statements, in an earlier portion of the opinion, that defense counsel "had been given pretrial access to the discovery materials which showed the conviction records were questionable," and that "during the sentencing proceeding, the prosecutor advised defense counsel of the discrepancies regarding the convictions . . . ." (App. 10a-11a).[31]

More importantly, the Commonwealth's post-sentence report, dated May 12, 1981, unmistakably stated that the most serious of the supposed "convictions" presented at trial—"Assault on Officer/Affray with a Deadly Weapon"—had been *nolle prossed*. (App. 43a). Without

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[30] The record includes a handwritten letter from Evans to his lawyer, dated March 2, 1982, stating in part: "I never assaulted a police officer. If you still think I did? please send me his name." [*sic*]

[31] If the prosecutor's highly improbable testimony on this matter (which defense counsel contradicted under oath) is to be credited as a basis for rejecting Evans' due process claim (*see* App. 10a-11a), it also establishes that defense counsel utterly failed to protect Evans' interest by failing to challenge the errors on appeal.

question that report was part of the trial record.[32] If Evans' counsel had read the report, as counsel claimed to have done (*see* App. 47a), he should have known—without investigating any matters "outside the record"—that Evans' death sentence was invalid.[33]

Moreover, contrary to the lower court's assertion (App. 15a), Evans suffered drastic prejudice from his counsel's errors. The plain fact is that if Evans' counsel had discovered the essential facts about their client's prior record at any time during the year-long appeal, Evans' sentence would have been voided, the Commonwealth would have been "foreclosed from seeking capital resentencing," and Evans would have "received an automatic sentence of life imprisonment." (*See* App. 5a).

IV. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN STATE AND FEDERAL COURTS OVER WHETHER DUE PROCESS REQUIRES A CAPITAL SENTENCING JURY TO BE TOLD, IN RESPONSE TO THEIR SPECIFIC QUESTION, THAT A SPLIT DECISION WILL AUTOMATICALLY RESULT IN A SENTENCE OF LIFE IMPRISONMENT.

Even if Virginia's amended sentencing statute could be applied to Evans, his 1984 resentencing proceeding was fatally flawed by the trial court's erroneous instruction, in response to a specific jury question, about the effect of a split decision. The court's instruction substantially increased the likelihood of a death sen-

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[32] *See* App. 49a ("The report of the probation officer is hereby filed as part of the record of this case.").

[33] At the September 21, 1983 hearing, counsel acknowledged that the portion of the post-sentence report indicating that the charge of assaulting a police officer had been nollied "should have" raised, but did not "raise a red flag to me." He stated: "I should have been more diligent. I should have read everything I got in the discovery, but I didn't, plain and simple." (App. 109a).

tence because it erroneously suggested that each juror had far less power to influence the outcome than was actually the case. The Fourth Circuit's opinion rejecting Evans' challenge to the jury instruction is a novel ruling that squarely conflicts with the decisions of the highest courts of two other states.[34] This Court should grant certiorari to resolve the conflict on this crucial issue.

Though scarcely mentioned in the opinion below, the relevant facts are neither complex nor contested. In the middle of its deliberations in the 1984 resentencing proceeding, the jury asked:

> The decision must be unanimous for death, must the decision also be unanimous for life, or *does a split decision automatically become life*?

(App. 122a) (emphasis added). Defense counsel then requested a response, based on the language of Virginia Code § 19.2-264.4(E), which would inform the jury that "if they cannot be unanimous on death, then it is life." (App. 122a). The court rejected that request, explaining:

> I will tell you what the flaw in that is, Mr. Howard [defense counsel], that encourages a single person

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[34] *See State v. Loyd*, 459 So. 2d 498, 502-03 (La. 1984); *id.* at 509 (separate opinions of Dennis, J., and Lemmon, J., concurring); *State v. Williams*, 392 So. 2d 619 (La. 1980). *See also State v. Ramseur*, 524 A.2d 188, 282-86 (N.J. 1987) (in a capital case, due process requires judge to inform jury about the effect of a split decision even if jury has not asked). The Fourth Circuit's decision also conflicts with the reasoning, if not express holding, of a decision of a panel of the United States Court of Appeals for the Eighth Circuit in a non-capital case. *See United States v. Arpan*, 861 F.2d 1073 (8th Cir. 1988), *vacated for rehearing en banc*, 867 F.2d 1188 (8th Cir. 1989). Although the panel decision in *Arpan* is now under review, its existence underscores that the lower courts are divided on how to answer jury questions concerning the effect of a split decision.

> to hold out, *and tells a single person that they have the ability to dictate the outcome.*

(App. 122a) (emphasis added).

The trial judge then answered the jury's question as follows: "You are instructed that your verdict must be unanimous as to either life imprisonment or death." (App. 123a). Although that response was technically accurate—a "verdict" by definition is a unanimous decision—it was both unresponsive and misleading. The jury had asked what would happen if it *failed* to reach unanimous agreement. The answer to that question could not be clearer: under Virginia law a split decision by a capital sentencing jury *does* "automatically become life." [35] The trial court's response to the jury's specific request for guidance not only withheld important information about the true state of Virginia law, but also could not have failed to leave the misleading and inaccurate impression that Evans would not receive a life sentence unless the jury's verdict was unanimous. This violated due process.

The circuit court's rejection of Evans' claim simply sidesteps the issue. In paraphrasing the jury's question, the court subtly distorts its meaning and misses its essential thrust. The jury did not simply inquire "whether a life sentence must be unanimous" (App. 13a); rather, in the heat of its deliberations it asked the trial judge

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[35] The Virginia Code explicitly provides that if a capital sentencing jury cannot reach a unanimous verdict, "the court *shall* dismiss the jury, and *impose a sentence of imprisonment for life.*" Va. Code § 19.2-264.4(E) (1983) (emphasis added). *See, e.g., Virginia Dept. of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399, 406 n.3 (1984) ("a single juror can prevent imposition of the death penalty"); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049 (1980) ("[A] disagreement by one or more of the jurors as to the proper sentence would, by statute, result in life imprisonment.").

"does a split decision automatically become life?" That is a different question, and it demanded a candid response.[36]

The precise federal question presented here was exhaustively addressed in two decisions of the Louisiana Supreme Court that directly contradict the Fourth Circuit's reasoning and result. In those cases, the court held that federal due process is violated by an instruction that leaves the individual jurors "free to speculate as to what the outcome would be in the event there was not unanimity" and creates the "false impression" that "a new trial, before another jury would be required."[37] Such errors are highly prejudicial because "[i]f only one of the twelve jurors was swayed by the failure to inform him fully of the consequences of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed."[38]

The Louisiana decisions correctly apply principles of this Court articulated in other contexts. Thus, in *Cald-*

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[36] The due process issue presented here is not even addressed, let alone resolved, by the decision in *Barfield v. Harris*, 540 F. Supp. 451, 472 (E.D.N.C. 1982), *aff'd*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), cited and relied upon by the court below. In *Barfield* the petitioner challenged the effectiveness of her trial counsel because he had *not requested* an instruction concerning the effect of a split decision in the penalty phase of her capital trial. *See* 540 F. Supp. at 461. The court held that petitioner was not denied due process either by counsel's failure to make the request, *id.* at 461-62, or by the trial judge's failure to give such an instruction on his own initiative, *id.* at 472. Unlike here, there was no defense request for an instruction on unanimity, no jury question at all, and no misleading response from the court.

[37] *State v. Williams*, 392 So. 2d at 631. *See also State v. Loyd*, 459 So. 2d 498 (La. 1984).

[38] *State v. Williams*, 392 So. 2d at 631. *See also State v. Loyd*, 459 So. 2d at 503 (capital sentencing presents a "unique" situation in which "a single juror, by persisting in a sentencing recommendation at variance with all of his fellow jurors, may alone cause imposition of a life sentence.").

well v. Mississippi, 472 U.S. 320 (1985), the Court voided a death sentence because the prosecutor's summation had created an "intolerable danger" that the jurors would underestimate the importance of their role in the sentencing process. *Id.* at 333. More recently, the Court ordered resentencing because an "ambiguity" in the state verdict form made it possible that the jurors "misunderst[oo]d the previous instructions as to unanimity. . . ." *Mills v. Maryland*, 108 S. Ct. 1860, 1869-70 (1988). The danger here was far greater than in either *Caldwell* or *Mills*. Each individual juror in the Evans case was in effect told—by the trial court, not the prosecutor [39]—that without the unanimous concurrence of his eleven peers, he was powerless to effect a life sentence, when in fact the precise opposite was true.

This Court has already imposed a "high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills*, 108 S. Ct. at 1870. Because the Fourth Circuit's decision endorses a sentencing instruction that falls far short of that standard, and conflicts with the express decisions in two other jurisdictions, this Court should grant certiorari to resolve the issue.[40]

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[39] *Cf. Darden v. Wainwright*, 477 U.S. 168, 183-84 n.15 (1986) (erroneous statements to the jury are more serious when they are approved by the judge).

[40] The question whether Evans is entitled to another resentencing takes on additional importance in light of the events that occurred after his 1984 sentencing. *See* note 7, *supra*. The jury that sentenced Evans to death did not know and could not have known that five months later Evans would risk his life to save the guards held hostage in the 1984 uprising at Mecklenburg prison. In any resentencing that evidence will be highly probative of whether there is still a "probability that [Evans] would commit criminal acts of violence that would constitute a continuing serious threat to society. . . ." Va. Code § 19.2-264.2(1) (1983).

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September 27, 1989

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment XIV, § 1 provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code § 19.2-264.2 provides:

> § 19.2-264.2. *Conditions for imposition of death sentence.*
>
> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

Virginia Code § 19.2-264.3 provides:

> § 19.2-264.3. *Procedure for trial by jury.*
>
> A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence . . . .
>
> C. If the jury finds the defendant guilty of an offense which may be punishable by death, then

a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty . . . .

[If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.] [Bracketed portion added by amendment of March 28, 1983].

Virginia Code § 19.2-264.4 provides:

§ 19.2-264.4. *Sentence proceeding*—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life. . . .

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

89-513

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, Superintendent,
Mecklenburg Correctional Center,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX—Continued

Note: The portions of the record included in this Appendix are reproduced as they appear in the original documents. To the extent that the originals include typographical errors, those errors appear here as well.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-4007

WILBERT LEE EVANS,
Petitioner-Appellant

v.

CHARLES THOMPSON, Superintendent,
Respondent-Appellee

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

[Filed Aug. 28, 1989]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Hall and Judge Doumar, United States District Court Judge.

For the Court

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-4007

WILBERT LEE EVANS,
Petitioner-Appellant,

versus

CHARLES THOMPSON, Superintendent,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr.,
Senior District Judge—(CA-87-622-R)

Argued: March 9, 1989 Decided: August 2, 1989

Before HALL and WILKINSON, Circuit Judges, and DOUMAR, United States District Judge for the Eastern District of Virginia, sitting by designation.

Thomas Francis Connell (Arthur F. Mathews, Thomas W. Jeffrey, WILMER, CUTLER & PICKERING; Jonathan Shapiro on brief) for Appellant. Robert H. Anderson, III (Mary Sue Terry, Attorney General of Virginia; Donald R. Curry, Senior Assistant Attorney General on brief) for Appellee.

WILKINSON, Circuit Judge:

Petitioner was convicted of capital murder and sentenced to death. Following a confession of error by the

prosecution, he was resentenced to death by a new jury. Petitioner contends that his resentencing was barred by the *Ex Post Facto* Clause, the Equal Protection Clause, and the Due Process Clause. He further argues that during resentencing he was denied his constitutional right to confront and cross-examine witnesses and that the trial judge improperly instructed the jury. Finally, he claims ineffective assistance of counsel both on direct appeal and during his first trial.

The district court rejected petitioner's claims. We affirm.

I.

On January 27, 1981, petitioner Wilbert Lee Evans shot and killed Deputy Sheriff William Truesdale while attempting to escape from state custody. Truesdale was escorting petitioner, at the time a North Carolina prisoner, to Alexandria, Virginia, where he was to testify as a witness for the Commonwealth of Virginia. Petitioner had pretended to be a willing witness for the Commonwealth for the sole purpose of escaping during his transportation from North Carolina to Virginia. He planned to kill anyone who attempted to prevent his escape and acted on this intent when he killed Truesdale.

In June 1981, petitioner was convicted of capital murder and sentenced to death in the Circuit Court of Alexandria, Virginia. The Supreme Court of Virginia affirmed his conviction and death sentence on December 4, 1981. On March 22, 1982, the Supreme Court denied certiorari.

In April 1982, petitioner filed a petition for a writ of habeas corpus in Alexandria Circuit Court. He amended his petition in May 1982 and again in December 1982.

On April 12, 1983, the Commonwealth formally confessed error in petitioner's sentencing proceedings and acknowledged that his death sentence should be vacated because erroneous evidence of his prior convictions had been admitted at trial. The circuit court vacated peti-

tioner's sentence and directed that a hearing be held to determine whether petitioner should be resentenced by a new jury or have his sentence reduced to a life term. Following a determination on October 12, 1983 that resentencing under the amended statute could proceed, the court impaneled a new jury which heard evidence of petitioner's history of violent criminal conduct. That jury recommended the death penalty based upon a finding of petitioner's "future dangerousness." On March 7, 1984, the trial court imposed the death penalty. The Virginia Supreme Court affirmed the sentence and the United States Supreme Court denied certiorari.

In May 1985, petitioner filed a third amended petition for a writ of habeas corpus in Alexandria Circuit Court. The circuit court dismissed his petition on May 19, 1986. The Virginia Supreme Court denied review as did the United States Supreme Court.

On October 5, 1987, petitioner filed for a writ of habeas corpus in the Eastern District of Virginia. In response to petitioner's request for discovery of the Commonwealth's files, the court conducted an *in camera* review of the files and, finding nothing relevant to petitioner's assertions, denied his request. On August 4, 1988, the court rejected Evans' petition.

Petitioner appeals.

II.

Petitioner contends there are three bars to his resentencing: A) the *Ex Post Facto* Clause; B) the Equal Protection Clause; and C) the Due Process Clause. We address each argument in turn.

A.

On March 28, 1983, Virginia enacted emergency legislation, amending its procedures for trial by jury in capital cases to permit capital resentencing by a newly impaneled jury where a prior death sentence was vacated

due to sentencing errors. Va. Code Ann. § 19.2-264.3C. Prior to this amendment, if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment. *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981). Petitioner contends that to resentence him to death pursuant to the March 1983 legislation, when both his offense and trial occurred before that date, retroactively deprives him of his right to have his death sentence converted to life imprisonment. We hold, however, that no violation of the *Ex Post Facto* Clause occurred.

The *Ex Post Facto* Clause exists to assure individuals fair notice of the nature and consequences of criminal behavior and to prevent the alteration of preexisting rules subsequent to the commission of an act. Two elements must exist for a law to fall within the *ex post facto* prohibition: 1) the law "must be retrospective, that is, it must apply to events occurring before its enactment," and 2) "it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnotes omitted). Central to the *ex post facto* inquiry is whether the law merely changes " 'modes of procedure which do not affect matters of substance,' " and hence is permissible; or whether it impacts on defendant's " 'substantial personal rights,' " and thus is prohibited. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977), *quoting Beazell v. Ohio*, 269 U.S. 167, 171 (1925). "[N]o *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt.' " *Miller v. Florida*, 107 S. Ct. 2446, 2452-53 (1987), *quoting Hopt v. Utah*, 110 U.S. 574, 590 (1884). *See also United States v. Juvenile Male*, 819 F.2d 468, 470-71 (4th Cir. 1987); *United States v. Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986).

The 1983 amendment does no more than change the procedures surrounding the imposition of the death penalty. It provides only that if a capital sentence is set aside, then a resentencing before a new jury can be held. When the offense was committed, the "willful, deliberate and premeditated killing of a law-enforcement officer . . . for the purpose of interfering with the performance of his official duties" was an offense for which the death penalty could be imposed. *See* Va. Code Ann. §§ 18.2-31(f); 18.2-10(a). Fair warning of punishment was thus afforded petitioner. The change in § 19.2-264.C3 was merely an "adjustment[] in the method of administering [petitioner's] punishment that [was] collateral to the penalty itself." *Evans v. Commonwealth*, 323 S.E.2d 114, 119 (Va. 1984).

In a case analogous to the present one, *Dobbert v. Florida*, 432 U.S. 282 (1977), a capital sentencing statute in effect when Dobbert committed murder was later held to be invalid. Dobbert, who had been sentenced to death pursuant to a subsequent statute, under which the judge had overruled the jury's recommendation of life imprisonment, argued that application of the new sentencing law violated his substantial rights. The Court concluded that *ex post facto* concerns were satisfied because the applicable statute when Dobbert committed murder warned him of the penalty Florida prescribed for first-degree murder. *Id.* at 298. The test of whether a change in law ran afoul of the *Ex Post Facto* Clause was not whether it worked to the detriment of a particular defendant. Rather, it was whether the changes "made criminal a theretofore innocent act," or "aggravated a crime previously committed," or "provided greater punishment," or "changed the proof necessary to convict." *Id.* The Virginia amendment neither increased the punishment attached to petitioner's crime, nor altered the ingredients of the offense, nor changed the ultimate facts

necessary to establish petitioner's guilt. It thus survives petitioner's *ex post facto* challenge.

Petitioner's reliance on *Kring v. Missouri*, 107 U.S. 221 (1883), is misplaced. Unlike in *Kring*, the petitioner here has not been convicted of a lesser offense for which the death penalty was not authorized, nor has he been acquitted of any offense for which the death penalty was authorized. Moreover, unlike *Kring*, the petitioner was not deprived of a defense available to him when he committed murder. *Kring* simply provides that if at the time of the offense, a defendant is on notice he can never be subjected to a death sentence, imposition of a death sentence violates the *Ex Post Facto* Clause. Here petitioner was on notice when he murdered Deputy Sheriff Truesdale that the imposition of death was a possible penalty.

Petitioner contends that the new Virginia law abrogated his right to be sentenced by the same jury which decided his guilt. He argues that a juror who sat through both phases of a capital trial might entertain doubts which, though not enough to defeat conviction, might convince him that the ultimate penalty should not be exacted. "Residual doubts" at the penalty stage of a capital trial, however, are constitutionally insignificant. *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2327 n.6 (1988). Moreover, it is possible that a juror less familiar with first-hand evidence of the crime and, having not just found petitioner guilty, may be less inclined to impose the maximum penalty.

The Virginia amendment represents a continuing effort by the Virginia Supreme Court, *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981), and the Virginia legislature to balance a defendant's right to fair sentencing with society's interest in not alleviating the consequences of criminal acts when a sentencing error occurs. *See Burks v. United States*, 437 U.S. 1, 15 (1978).

It promotes the basic aspiration of criminal justice to achieve results that are error-free. The Virginia Supreme Court has recognized the ameliorative purposes of the enactment:

> the new law provides for impanelling a new jury, free of any taint arising from errors during the first trial, to redetermine the defendant's punishment. A defendant convicted of capital murder is entitled to a fair and impartial determination of his punishment: he will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him.

Evans, 323 S.E.2d at 119.

The *Ex Post Facto* Clause does not confer upon this defendant an unalterable right to be sentenced by the jury which found his guilt or never to be resentenced in any fashion. To confer such a right would have serious implications for the workings of our federal system. That system presupposes that states will routinely undertake to improve their methods of jury selection, their rules of evidence, the availability of appeals and post-conviction proceedings, and other procedures of their criminal justice systems. To hold that every change with an arguable adverse impact upon the outcome of a criminal case has *ex post facto* implications would seriously inhibit this process of reform, because legislation generally has an effective date of enactment independent of the date of the commission of an act. The elusive nature of the *ex post facto* prohibition derives from the fact that law does and should evolve. The Supreme Court has long emphasized that "the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him." *Thompson v. Utah*, 170 U.S. 343, 351 (1898). We reject petitioner's attempt to create such a right in this instance.

B.

Petitioner also argues that the Equal Protection Clause bars his capital resentencing. He claims that he and the defendant in *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981), who received an automatic sentence of life imprisonment at his resentencing, were identically situated in all respects, except that Patterson's death sentence was vacated prior to enactment of the amendment. Treating him differently than Patterson, he contends, did not rationally further any legitimate state objective.

We find no merit to this contention. Because capital defendants are not a suspect class for equal protection purposes, *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987), legislative classifications must be presumed valid and sustained if they are "rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). In making the rational basis inquiry, we must determine if classifying Patterson and petitioner differently has a "'fair and substantial relation to the object of the [1983 amendment].'" *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972), *quoting Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

The purpose of the 1983 amendment is straightforward: to establish new procedures for resentencing in capital cases where a prior death sentence is vacated. Like Florida in *Dobbert*, the Commonwealth "had to draw a line at some point," *Dobbert*, 432 U.S. at 301, and to apply the amendment only to those defendants whose sentences were vacated following the amendment's enactment is entirely rational. As the district court recognized, it ties the amendment's application to the event which necessitates resentencing: vacating the original sentence. Accordingly, classifying petitioner and Patterson differently is permissible.

C.

Petitioner further argues that prosecutorial misconduct bars this resentencing. He contends that state prosecutors violated his due process rights when they knowingly proffered false conviction records at his original sentencing hearing and then deliberately delayed confessing error until after the 1983 amendment was enacted.

We disagree. Pursuant to 28 U.S.C. § 2254(d), a federal habeas court is required "to accord a presumption of correctness to state court findings of fact." *Sumner v. Mata*, 455 U.S. 591, 592 (1982); *Hunt v. Woodson*, 800 F.2d 416, 419 (4th Cir. 1986). In particular, a state court finding that the government acted in good faith where defendant alleges he has been the victim of intentional or purposeful government misconduct, is entitled to a presumption of correctness. *Sanderson v. Rice*, 777 F.2d 902, 909 (4th Cir. 1985); *Rose v. Duckworth*, 769 F.2d 402, 405 (7th Cir. 1985). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). "[I]t must conclude that the state court's findings lacked even 'fair support' in the record." *Id.*

Here the record supports the state court's findings, upheld by the district court, that the Commonwealth acted in good faith. *See Evans*, 323 S.E.2d at 119-121. At an evidentiary hearing, conducted by the trial court in response to petitioner's claims of prosecutorial misconduct, the prosecuting attorney testified he never intended to deceive the trial judge, the jury, or the defense concerning the true status of petitioner's record. He also testified that defense counsel had investigated petitioner's prior record, had informed him that they were familiar with petitioner's record, and had been given pretrial access to discovery materials which showed the conviction records were questionable. Moreover, during the sentencing proceeding, the prosecutor advised defense counsel of the

discrepancies regarding the convictions and testified that he assumed defense counsel would explain the error to the jury during closing argument. In his own argument to the jury, the prosecutor alluded only to those offenses for which petitioner had actually been convicted.

Likewise, the assistant attorney general who handled petitioner's first appeal and the habeas corpus proceeding testified that he did not purposefully delay confessing error until passage of the amendatory legislation. He noted that he "wanted to be one hundred percent sure" before confessing error in a capital case, already affirmed on direct appeal. Nothing in § 2254(d) "gives federal habeas courts . . . license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall*, 459 U.S. at 434. Additionally, the trial court, the Virginia Supreme Court, and the federal district court conducted an *in camera* review of the original files in the governor's office and the attorney general's office relating to the drafting, introduction, consideration, and approval of the new legislation and found nothing to support petitioner's claim.

To the extent that the prosecutor was guilty of unintentional errors of judgment in his handling of the case, these errors were remedied when petitioner received a new sentencing proceeding free of false or misleading evidence. A defendant must show "demonstrable prejudice," that cannot be cured by a "traditional" remedy, such as resentencing, to obtain the "drastic" remedy that Evans seeks. *United States v. Morrison*, 449 U.S. 361, 365 & n.2. Petitioner's argument that he was demonstrably prejudiced by resentencing because he was thereby deprived of an automatic sentence of life imprisonment is misplaced. Petitioner's conviction carried the same possible penalty it did when he committed it.[1]

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[1] Petitioner also argues that his resentencing violates the Double Jeopardy Clause. We disagree. The clause generally does not pro-

III.

Petitioner contends that two errors occurred during his resentencing: 1) he was denied his constitutional right to confront and cross-examine adverse witnesses because the prosecution read into the record the 1981 trial transcript testimony of these witnesses, and 2) he was denied his due process rights because the trial judge improperly instructed the jury that a sentence of life imprisonment could be imposed only by a unanimous verdict. We find neither contention persuasive.

Petitioner's cross-examination claim must fail because such a claim implies that the trial court denied a request to confront and cross-examine adverse witnesses. Petitioner relies upon *Tichnell v. State*, 427 A.2d 991, 993 (Md. App. 1981), which involved a transcript used despite defendant's "vociferous objection." Here the district court expressly found that "[t]he record clearly shows that Evans' counsel agreed to the use of a transcript at resentencing." The trial record amply supports this finding. Moreover, Evans may well have benefited by agreeing to have the trial transcript read to the jurors, as opposed to live testimony.[2]

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hibit resentencing where a verdict has been set aside for trial error. *Lockhart v. Nelson*, 109 S. Ct. 285, 290-91 (1988). The clause would operate here only if the error was the product of deliberate prosecutorial misconduct. *Oregon v. Kennedy*, 456 U.S. 667, 674-79 (1982).

The state habeas courts found the Commonwealth acted in good faith. Because such findings are subject to the mandate of § 2254, *see Rose*, 769 F.2d at 405, and no evidence contradicts the findings of these courts, the Double Jeopardy Clause is inapplicable.

[2] Petitioner failed to raise his confrontation claim both at trial and on direct appeal. When he raised his claim in the state habeas court, the Commonwealth asserted that the claim had been defaulted. The state habeas court dismissed the claim "for the reasons stated in the [Commonwealth's] answer." The Virginia Su-

Petitioner's contention that the trial judge improperly failed to instruct the jury that under Virginia law a split decision by a capital sentencing jury automatically becomes life is also without merit. In response to the jury's inquiry of whether a life sentence must be unanimous, the trial judge instructed the jury that its "verdict must be unanimous as to either life imprisonment or death." Such instructions accurately state Virginia law, which requires that the verdict in all criminal prosecutions be unanimous. *See* Va. Rule 3A:17(a). No obligation exists for the trial judge to inform the jury of the ultimate result should they fail to reach a verdict. *See Barfield v. Harris*, 540 F. Supp. 451, 472 (E.D.N.C. 1982), *aff'd*, 719 F.2d 58 (4th Cir. 1983). In addition, the trial judge's response to the jury's inquiry left no doubt that a non-unanimous verdict would not result in death.

No "substantial probability" exists that the trial court's instruction misled the resentencing jury as to unanimity. *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988). The jury was simply told that any verdict must be reached unanimously. During *voir dire*, moreover, each juror was informed that even as a minority of one, he or she could hold out if convinced that a life sentence was appropriate. At closing, defense counsel reminded the jury that their sentence must be unanimous. Finally, when polled individually, each juror affirmed the verdict as his or her own.

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preme Court affirmed this dismissal, finding "no reversible error in the judgment complained of."

Pursuant to *Harris v. Reed*, 109 S. Ct. 1038, 1043 (1989), "a procedural default does not bar consideration of a federal claim on . . . habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id., quoting Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). While we think the Virginia courts did intend to hold petitioner's claim procedurally barred, we address the merits of the claim to remove any question with regard to it.

IV.

Petitioner raises two final claims: 1) that he was denied his right to effective assistance of counsel on direct appeal from his 1981 conviction because his counsel failed to discover and inform the court that his death sentence was based on false evidence, and 2) that he was denied his right to effective assistance of counsel during his 1981 trial when his counsel failed to object to the prosecution's assertion that he was a multiple murderer.[3] We reject both claims.

Petitioner's argument of ineffective assistance on direct appeal fails to meet the criteria of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, petitioner must show that counsel's performance fell outside the "wide range of reasonable professional assistance," *id.* at 689, and "that the deficient performance prejudiced the defense" to an extent "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *See also United States v. Alexander*, 789 F.2d 1046, 1051 (4th Cir. 1986); *Roach v. Martin*, 757 F.2d 1463, 1476-77 (4th Cir. 1985). This standard applies to claims against both trial and appellate counsel. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Griffin v. Aiken*, 775 F.2d 1226, 1235-36 (4th Cir. 1985).

Petitioner has failed to overcome the strong presumption that counsel's performance was reasonable. Prior to trial, counsel traveled to North Carolina to investigate petitioner's record of prior convictions and found them

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[3] Petitioner also argues that the guilt phase of his trial was flawed because the trial court permitted the Commonwealth to change the crime charged from a non-capital to capital offense. We disagree. Virginia law permits amendments at any time prior to the verdict, Va. Code Ann. § 19.2-231, so long as the amendment does not change the "nature or character of the offense charged." Here the language of the indictment clearly charged a capital offense. The amendment merely corrected an error in citation of the capital murder statute.

in disarray. Accordingly, he objected to some of the records when they were introduced at trial. Following the trial, counsel determined what he believed to be petitioner's most viable arguments and raised them on appeal. Doing so was sound trial strategy. *See Michel v. Louisiana*, 350 U.S. 91, 101 (1955). The errors in the certified conviction records introduced at trial could only be shown by going outside the trial record. Counsel, however, was under no duty to go beyond the trial record because nothing beyond that record would have been cognizable on appeal. *See Guthrie v. Commonwealth*, 186 S.E.2d 68, 70 (Va. 1972). *See also O'Dell v. Commonwealth*, 364 S.E.2d 491, 505 n.8 (Va. 1988).

Additionally, petitioner cannot demonstrate that he has been prejudiced by counsel's alleged error. Vacating his original sentence and affording him resentencing free of error mooted any claims of prejudice. *Hyman v. Aiken*, 777 F.2d 938, 941 (4th Cir. 1985), *vacated on other grounds* 478 U.S. 1016 (1986). Petitioner cannot show a "reasonable probability" that the result of the proceeding would have been different but for his counsel's alleged errors. *Strickland*, 466 U.S. at 694.

Likewise, petitioner's claim that his 1981 trial counsel improperly failed to object to the prosecution's assertion he was a multiple murderer fails *Strickland* scrutiny. Pursuant to § 2254(d), *see Hoots v. Allsbrook*, 785 F.2d 1214, 1219 n.6 (4th Cir. 1986), we must accept the state habeas court's express factual finding that petitioner's counsel chose not to object to the prosecutor's argument for tactical reasons. *See Strickland*, 466 U.S. at 689; *Jeffers v. Leeke*, 835 F.2d 522, 525 (4th Cir. 1987). Defense counsel testified that he chose not to object to the prosecutor's argument because he felt an objection would only have emphasized the matter before the jury. As the district court also noted, "[r]ather than draw further attention to the evidence, defense counsel instead chose to

attack the credibility of the relevant witnesses during argument." This is a judgment trial attorneys make routinely. It does not give rise to a claim under *Strickland.*

For all these reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 87-0622-R

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,
Respondent.

MEMORANDUM

[Filed Aug. 4, 1988]

This matter comes before the Court on respondent's Motion to Dismiss Evans' Petition for Writ of Habeas Corpus. The issues have been extensively briefed by the parties and the Court has heard oral argument. Jurisdiction is premised on 28 U.S.C. § 2254.

Background

In April 1981, Wilbert Lee Evans was tried and convicted of capital murder in the shooting death of an Alexandria deputy sheriff. The jury found Evans guilty of the willful, deliberate and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties. Va. Code § 18.2-31(f). Pursuant to the recommendation of the jury, the Circuit Court for the City of Alexandria imposed sentence of death. The conviction and death sentence were affirmed by the Virginia Supreme Court in December, 1981. *Evans v. Commonwealth*, 222 Va. 766,

284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1038 (1982) (*"Evans I"*).

In April 1982, Evans, represented by new counsel, filed a state habeas petition in Alexandria Circuit Court. Evans amended his petition in May 1982, and filed a second amended habeas petition in December 1982.

On March 28, 1983, the Commonwealth of Virginia enacted emergency legislation (the "1983 amendment") amending its death penalty statute to permit capital resentencing for cases in which a first death sentence has been vacated due to constitutional error in the sentencing phase. Prior to March 28, 1983, Va. Code § 19.2-264.3C provided for capital sentencing by the same jury which had determined guilt. In *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), the Virginia Supreme Court found that the original jury was tainted for sentencing purposes, and that § 19.2-264.3C therefore precluded capital resentencing under the circumstances. Largely in response to *Patterson*, the Virginia legislature enacted the 1983 amendment to § 19.2-264.3C, which expressly permits impaneling a new jury for resentencing when a death sentence has been set aside.

In April 1983, the Commonwealth by letter formally confessed error in the sentencing phase of Evans' April 1981 trial. On May 2, 1983, the trial court granted the portions of the second amended habeas petition pertaining to the confession of error, and vacated the death sentence.

Following the Commonwealth's notice of its intention to seek reimposition of the death penalty under the amended statute and the filing of Evans' motion to bar resentencing, Judge Wright of the Alexandria Circuit Court held a hearing on September 21, 1983 to determine whether resentencing was constitutionally permissible. Due to Evans' allegations of prosecutorial misconduct, Judge Wright conducted a thorough *in camera* review of

the Commonwealth's files relating to the 1983 amendment, ruled that none of the documents were material to Evans' claims, and sealed in the record those documents which the parties and the Court deemed to be in any way related to Evans' claims. On October 12, 1983, the Court ruled that resentencing under the amended statute could proceed. The resentencing jury recommended sentence of death, which the Alexandria Circuit Court imposed on March 7, 1984. The Virginia Supreme Court affirmed the sentence in *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*).

In May 1985, Evans filed his third amended state habeas petition. Judge Kent of the Alexandria Circuit Court set four of Evans' claims for a plenary hearing and dismissed the remainder of the third amended petition. Judge Kent denied Evans' motion for recusal, and following the hearing denied the third amended habeas petition. The Virginia Supreme Court denied review, as did the United States Supreme Court. *Evans v. Commonwealth*, 107 S.Ct. 3240 (1987) (*"Evans III"*).

Evans filed his § 2254 petition with this Court on October 5, 1987. In response to Evans' motion for leave to serve a request for production of documents, the Court conducted an *in camera* review of the materials reviewed previously by Judge Wright. Finding nothing relevant to the issues in this case, the Court denied Evans' discovery request.

Evans raises numerous issues in the instant petition. He charges violation of the Ex Post Facto Clause, prosecutorial misconduct, an equal protection violation, ineffective assistance of counsel at the guilt phase of trial and on appeal, violation of Confrontation Clause rights at resentencing, an erroneous response by the trial court to an inquiry by the resentencing jury, and improper refusal of a state habeas judge to recuse himself.

Discussion

Evans contends that the application of the 1983 amendment to the Virginia death penalty statute, enacted after his conviction, violates the Ex Post Facto Clause of the Constitution. He claims that after *Patterson*, 222 Va. 653, 283 S.E.2d 212, he had a "substantial right" to have his death sentence reduced to life. Evans asserts that the 1983 amendment retrospectively deprives him of this substantial right.

The *ex post facto* prohibition, designed to assure that criminal laws provide fair warning of their meaning and effect to the individuals subject to them, is implicated when the law is retrospective and disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). This constitutional protection is directed to substantial personal rights; although it may work to the disadvantage of a defendant, a procedural change will not be found *ex post facto*. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).[1] In determining whether a legislative change is substantive, or merely addresses "remedies and modes of procedure which do not affect matters of substance," the Court must examine whether the law increases the punishment or changes the necessary elements of the offense. *Miller v. Florida*, 107 S.Ct. 2446, 2452-53 (1987) (*quoting Dobbert*, 432 U.S. at 293, and *Hopt v. Utah*, 110 U.S. 574, 590 (1884)).

In *Dobbert*, a defendant who had been sentenced to death by the trial judge despite the jury's recommendation of a life sentence argued that a change in the law deprived him of "a substantial right to have the jury

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[1] *Dobbert* also holds that changes in the law which are on the whole ameliorative cannot be *ex post facto* violations. *Id.* Although the 1983 amendment cannot be considered ameliorative, *Dobbert* makes clear that the procedural and ameliorative nature of a change of law are independent bases for finding no *ex post facto* violation. *Id.* at n. 6. A procedural change is not *ex post facto* even if it is not ameliorative. *Id.*

determine, without review by the trial judge, whether [the death penalty] should be imposed." 432 U.S. at 292. Concluding that the crime, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish guilt were all unaffected by the change in the law, the Supreme Court found the change procedural, and hence not an *ex post facto* violation. *Id.* at 292-94 (*quoting Hopt*, 110 U.S. at 589-90).

Under the test applied in *Dobbert* and expressly reaffirmed in *Miller*, the change in Evans' case wrought by the 1983 amendment must be deemed procedural. The amendment's effect is to change the procedures surrounding imposition of the death penalty. The crime of which Evans was convicted carries the same two possible punishments today that it carried the day he committed it: death or life imprisonment.[2] Neither the quantum of punishment, nor the quantity or degree of proof necessary for imposition of that punishment have been altered by the 1983 amendment.

Evans relies upon *Kring v. Missouri*, 107 U.S. 221 (1882) for the proposition that a change of law which deprives a defendant of an absolute defense[3] is necessarily "substantial" for *ex post facto* analysis purposes. The *Kring* holding, however, is by no means so sweeping. The *Kring* defendant, charged with capital murder, pled guilty to second degree murder. The Missouri law which

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[2] In contrast is *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987), in which the Fourth Circuit found an *ex post facto* violation because the change in law, which increased the punishment for the offense, could not be deemed procedural.

[3] Evans claims a "vested right" to a life sentence under *Patterson*, 222 Va. 653, 283 S.E.2d 212. Respondent vigorously disagrees, arguing that the Virginia Supreme Court rejected this claim as a matter of Virginia law in *Evans II*. Because the Court finds the 1983 amendment to be procedural in nature, it is unnecessary to determine what effect *Patterson* would have had on Evans' sentence absent the 1983 amendment.

declared that a person who pled guilty to second degree murder was accquitted of first-degree murder was later amended to allow retrial for first degree murder if the conviction based on the guilty plea was overturned. *Id.* at 222-23. The change of law, by which a defendant who had pled guilty to second degree murder to forever avoid the threat of the death penalty was later exposed to the death penalty, was held to be a deprivation of a substantial right, and a *ex post facto* violation. Although *Kring* did hold that the substantive change of law which deprived the defendant of protection from the death penalty was an *ex post facto* violation, it simply cannot be construed as requiring the courts to find an *ex post facto* violation whenever any absolute defense is lost.[4]

Evans next argues two issues of prosecutorial misconduct. He contends that the Commonwealth's Attorney knowingly used false evidence to obtain the original death sentence, and that the Attorney General purposely delayed conceding error in the original sentencing proceeding until the 1983 amendment could be enacted. Evans argues that the conduct of the Commonwealth so violated due process as to bar the subsequent sentencing proceeding.

In the original sentencing phase of Evans' trial, the jury recommended the death penalty based solely upon a finding of future dangerousness. The Commonwealth had relied heavily on records of seven purported prior convictions in making its case to the jury. In his amended habeas petition of May 5, 1982, Evans argued that one of the "convictions" had actually been *nol prossed*, and that another had been tried *de novo* and was already

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[4] Subsequent Supreme Court cases have explained the reasoning of the Court in *Kring*, and have further expounded the proper *ex post facto* analysis. *See, e.g., Hopt*, 110 U.S. 574; *Dobbert*, 432 U.S. 282; *Weaver*, 450 U.S. 24. To the extent *Kring*, an 1882 case, may be construed as conflicting with these cases, it must be deemed modified or overruled.

reflected in a third conviction presented to the jury. On April 12, 1983, the Commonwealth confessed these errors and further admitted that the jury had been informed of two uncounseled convictions.

On September 21, 1983, the trial court conducted an extensive evidentiary hearing on Evans' claims of misconduct by the Commonwealth. The Court concluded with respect to the alleged misconduct by the trial prosecutors, that

> the defendant has failed to prove to the satisfaction of the Court that the prosecution engaged in such misconduct or tactics as to warrant the Court in concluding that the Commonwealth is precluded from again seeking the death penalty.[5]

The trial court also found no purposeful or wrongful delay in the confession of error by the Commonwealth. Judge Wright ruled that the record did not show any tactical maneuvering by the Attorney General's Office with respect to the 1983 amendment. These findings were affirmed by the Virginia Supreme Court on direct appeal. *Evans II*, 323 S.E.2d at 119-121.

In making these factual findings, the trial court relied on an extensive evidentiary hearing and an *in camera* review of the origial files of the Governor's Office and the Attorney General's Office relating to drafting, introduction, consideration, and approval of the 1983 amendment.

This Court has conducted a similar *in camera* review, and additionally has reviewed the Attorney General's file concerning Evans' original direct appeal. These records

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[5] As the trial court recognized, it is clear that error did occur at the original sentencing proceeding. That, however, is not the issue before this Court, nor was it before Judge Wright, because the improper sentence has been vacated. The issue is whether the Commonwealth engaged in misconduct sufficient to preclude resentencing at a new, error-free proceeding.

fail to provide any support for Evans' claim of prosecutorial misconduct.

It is clear under 28 U.S.C. § 2254(d) that this Court must "accord a presumption of correctness to state-court findings of fact." *Sumner v. Mata*, 455 U.S. 591, 592 (1982). Furthermore, factual determinations implicit in the trial ccourt's findings are to be presumed correct. *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983); *Hartman v. Blankenship*, 825 F.2d 26, 28 n.2 (4th Cir. 1986). The state court's findings that the trial prosecutor was guilty of an error in judgment but not of the knowing utilization of false evidence, and that the Commonwealth did not purposefully or wrongfully delay in vacating the original death sentence, are fairly supported by the record, and may not be rejected by this Court on federal habeas review. *Marshall*, 459 U.S. at 434-35. The errors of the prosecution at sentencing were remedied when Evans received a new sentencing trial, free of false or misleading evidence. *See United States v. Morrison*, 449 U.S. 361 (1981).

Evans' next contention is that his exposure to a resentencing proceeding under the 1983 amendment, while others similarly situated automatically received life sentences under *Patterson*, constitutes a violation of the Equal Protection Clause. He argues that he and the *Patterson* defendant were similarly situated in all respects other than the time at which their death sentences were vacated. Evans contends that there is no rational reason for treating him differently from the *Patterson* defendant under the 1983 amendment.

The appropriate equal protection analysis in cases not involving suspect classes[6] is that the classifications are presumed to be valid, and will be sustained if rationally related to a legitimate state interest. *City of Cleburne*,

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[6] Capital defendants are not a suspect class for equal protection purposes. *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987).

Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985). In making the rational basis inquiry, the Court must determine whether there is some difference between Evans and the *Patterson* defendant having a fair and substantial relation to the object of the legislation. *See Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Even if the Court assumes that the sole distinguishing factor between Evans' case and *Patterson* is the point in time when the death sentences were set aside, the equal protection claim fails.

The purpose of the 1983 amendment is to establish a new procedure for determining the sentence for capital cases in which a death sentence is vacated. Drawing a line at the time the death sentence is set aside, and resentencing under the 1983 amendment only those defendants whose sentences were vacated after the new procedure was enacted cannot be considered irrational. The state's decision to draw the line at some point between those cases which have progressed sufficiently far in the legal process to be governed solely by the old statute, and those subject to the procedures of the new statute survives equal protection scrutiny. *See Dobbert*, 432 U.S. at 301. The 1983 amendment is a procedural change, and it is rational that its application be tied to the event which necessitates a resentencing procedure: vacating the original sentence.

Next, Evans contends that he was denied the effective assistance of counsel on direct appeal of his original death sentence when appellate counsel failed to argue the errors in the records of Evans' prior convictions. To sustain a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient, and that the deficiency prejudiced his case. *Strickland v. Washington*, 446 U.S. 668, 687 (1984).

Any ineffectiveness of counsel at the original sentencing trial, however, was mooted when the death sentence was vacated, and Evans was provided a new sentencing proceeding free from error. *See Hyman v. Aiken*, 777 F.2d

938, 941 (4th Cir. 1985). *Cf. Poland v. Arizona*, 476 U.S. 147, 152 (1986) ("clean slate rule" provides that when a defendant obtains reversal on appeal, original conviction is nullified with no double jeopardy implications on retrial). Evans has not demonstrated *Strickland* prejudice, and this ineffective assistance claim must therefore fail.

The petition also alleges ineffective assistance of counsel at the guilt stage of Evans' trial. Evans contends that his counsel committed error by failing to object when the prosecutor commented in closing argument about prior murders while arguing defendant's motive. The state habeas court conducted an evidentiary hearing on this claim and made specific findings that Evans' trial attorneys reasonably chose not to object or request a limiting instruction for tactical reasons. The prosecutor's comments were based on evidence which had been previously admitted, over defense counsel's objections, as to the defendant's motive, and evidence which the defendant had offered to impeach a Commonwealth witness. Rather than draw further attention to the evidence, defense counsel instead chose to attack the credibility of the relevant witness during argument. Evans has not overcome the strong presumption that counsel's actions constituted sound trial strategy, *Strickland*, 466 U.S. at 689, and hence has not shown that he was denied effective assistance of counsel.

In a footnote to the petition, Evans contends that he was deprived of due process and received ineffective assistance from counsel at the guilt phase when, on the day of trial, the Commonwealth moved to amend the indictment and no objection was raised by Evans' counsel. Claims concerning the amendment of the indictment have been procedurally defaulted, and review by this Court is thus barred by *Wainwright v. Sykes*, 433 U.S. 72 (1977). Further, Evans himself recognizes that an indictment in Virginia may be amended at any time prior to the verdict. Va. Code § 19.2-231. Even if this claim had not been procedurally defaulted, alleged defects in an indict-

ment will give rise to federal habeas relief only where the deficiency rendered the trial egregiously unfair. *Ashford v. Edwards*, 780 F.2d 405, 407 (4th Cir. 1985). The amendment to the indictment in this case did not alter any of the alleged facts, but merely designated a different Code section as applicable to the allegations. No resulting unfairness has been demonstrated.

Evans next contends that the use of a transcript at the resentencing trial rather than live witness testimony violated his rights under the Confrontation Clause. The record clearly shows that Evans' counsel agreed to the use of a transcript at resentencing. Evans did not raise a Confrontation Clause claim in the trial court. The state habeas court and the Virginia Supreme Court thereafter rejected Evans' claim as procedurally defaulted. *See Hargrave v. Landon*, 584 F. Supp. 302, 309-10 (E.D. Va.) (*citing Tweety v. Mitchell*, 682 F.2d 461 (4th Cir. 1982), *cert. denied*, 460 U.S. 1013 (1983)), *aff'd*, 751 F.2d 379 (4th Cir. 1984), *cert. denied*, 473 U.S. 907 (1985). This Court is therefore precluded from reviewing this claim on the merits. *Wainwright v. Sykes*, *supra*. Evans' assertion that he did not raise an objection because he perceived it to be futile does not avoid the procedural bar. *See Engle v. Issac*, 456 U.S. 107, 130 (1982).

Evans further claims that the trial court's response to a jury inquiry in the resentencing proceeding was contrary to Virginia law and violated due process. After retiring to deliberate, the jury sent a question to the court:

> The decision must be unanimous for death, must the decision also be unanimous for life or does a split decision automatically become life?

The trial judge responded that "[a] verdict must be unanimous as to either life imprisonment or death." The trial judge accurately stated Virginia law, which requires the verdict in all criminal prosecutions to be unanimous. *Evans II*, 228 Va. at 481, 323 S.E. 2d at 121.

Due process does not require the trial court to inform the jury of the ultimate result should they fail to reach a verdict. *Barfield v. Harris*, 540 Supp. 451, 472 (E.D. N.C. 1982), *aff'd*, 719 F.2d 58 (4th Cir. 1983). Each juror was instructed at *voir dire* as to the importance of his individual decision, and each swore to vote according to his own conclusions. The Court cannot accept Evans' argument that the trial judge's answer could lead a juror to conclude that he was powerless to effect a life sentence, or that he should abandon a sincerely-held position against imposition of the death penalty. *Compare Mills v. Maryland*, 56 U.S.L.W. 4503 (U.S. June 6, 1988) (substantial probability that jury instruction as given misled the jury).

Finally, Evans contends that the failure of the trial judge to recuse himself from Evans' third amended state habeas petition denied Evans due process of law. Questions of judicial disqualification are generally issues of state law, and only in the most extreme of cases is the Due Process Clause implicated. *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580, 1585 (1986). Evans alleges that recusal was required because his claims of ineffective assistance required scrutinizing the performance of trial counsel, a former courtroom deputy clerk for Judge Kent. Judge Kent's interest in this case is neither extreme nor "direct, personal, substantial, and pecuniary." *Id.* at 1585-86. This claim therefore does not present a constitutional issue.

Conclusion

For the foregoing reasons, each of the petitioner's claims fails as a matter of law. The respondent's motion to dismiss will therefore be granted, and Evans' petition will be dismissed.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date Aug. 4, 1988

SUPPLEMENTAL REPORT

/s/ S.R.S. 2/—/81

TO: Case Jacket, EVANS, Wilbert Lee

Offense: Homicide

On February 23rd, 1981, this assistant traveled to Raleigh, North Carolina with Investigator John Turner in an attempt to ascertain additional background information on the suspect in this case. Upon arrival in Raleigh, we met with Investigator D.C. Williams, RPD Investigations (Major Crime Unit). Williams can be reached by telephone at 919-755-6420. Williams made available to us all recorded police reports and arrest cards on EVANS which he could locate in a record check with his department. Copies of these reports and cards were made and are included in the case jacket as part of this report.

* * * *

1. B/E, Larceny	12-12-63	2-21-64	6 mo. youth camp
2. A/B on officer	7-26-64	7-30-64	6 mo. jail
3. Affray w/DW	7-26-64	7-30-64	6 mo. jail (consec).
4. 2 and 3 above on appeal	same		2: nollied 3: 4 mo. jail
5. A/B	11-19-69	12-15-70	60 days jail
6. Felony assault	12-14-70	9-27-72	4 to 5 yrs. prison.

Note: Defendant's release date from prison was 2-27-76

7. Escape	12-29-70	7-12-72	90 days

(while serving sentence on case #5 above)

NAME: Wilbert Lee Evans

* * * *

RECORD

* * * *

9/29/64 In Wake Superior Court, docket 10494 appeal Aslt on officer DW, affray D.W. Plea guilty to affray DW. 4 mos on rds. Nol pros as to aslt on officer.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT E. EVANS,
Defendant.

Alexandria, Virginia
April 17, 1981

* * * *

[568] THE COURT: The Clerk will read the verdict, please.

THE CLERK: We, the jury, find the defendant, Wilbert Lee Evans, guilty of capital murder as charged in Count 1 of the indictment.

* * * *

THE COURT: Are you gentlemen ready to proceed with the next phase of the trial?

MR. LONG: Yes.

MR. KLOCH: Yes.

THE COURT: Do you have evidence to present, Mr. Long?

MR. LONG: May we approach the bench?

[569] (Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. LONG: We were given copies, certified copies, by Mr. Kloch from North Carolina and the first one is a

charge in '64 regarding an indictment for housebreaking or breaking and entering and larceny, and as I understand, both of them are indictments of felonies. Here it doesn't say felony or misdemeanor. I called the attorney in North Carolina and, obviously, I'm going to object unless it says felony. If Your Honor will look—for instance, this one is quite clear, and I'm just stating for the record what the attorney in North Carolina stated to me, and, of course, this was telephonically, but I'm going to object otherwise. Telephonically, he said, yes, that if there were a trial and conviction, in all likelihood there would be two felonies, but the larceny is $26 and if there was a plea to both, but in all likelihood this is a felony conviction and a misdemeanor on the larceny. There's no indication whether this is a felony or a misdemeanor.

One of the things we have to prove or disprove is a criminal record. This is eighteen years ago, but I think the commonwealth has the burden beyond a reasonable doubt. It's not our burden.

[570] THE COURT: Let me take a look at the record.

Let me send the jury out until we get this resolved.

(Whereupon, the bench conference was concluded and the proceedings continued within the hearing of the jury.)

THE COURT: Ladies and gentlemen of the jury, it will take us a few minutes to resolve this question and I would ask that you return to the jury room if you would, please.

(Whereupon, the jury left the courtroom.)

MR. KLOCH: Your Honor, I have another copy of the the Court.

THE COURT: All right.

Let me read it; then we'll discuss it.

The indictment, which is the first sheet, indicates the defendant had been indicted on two charges. The first is breaking and entering, which is a felony, and the second, grand larceny, which is a felony. The commit-

ment which immediately follows the indictment only refers to the charge of breaking and entering and it indicates an inure plea of guilty and sentenced to six months.

What is the question?

[571] MR. LONG: The question is: there is nothing on the commitment, on this commitment that indicates it is a felony. When you look at the other documents, there's an indication as to whether it is a felony or a misdemeanor. Everything thereafter says a felony or misdemeanor. The indictment is not evidence of conviction of a felony.

Your Honor, it's encumbent on the commonwealth to prove commission of a felony, not the defendant. Felonies have a different connotation to the jury, to the Court or anybody else than a misdemeanor.

To go one step further, the thing that bothers me so much—another thing that bothers me, we don't know if this first charge is the same charged in the second one. There is no number on them. I'm simply saying that the first charge says, "On the 12th of December, 1963," and then it says, "The January term of 1964," and the next one says February of '64.

THE COURT: Brought to trial in February.

MR. LONG: It might be. It looks like it is probably the same thing. But we're not dealing with probability; we're dealing with beyond a reasonable doubt.

MR. KLOCH: Your Honor, first of all, the indictment on the larceny, the bottom part of it says, "steal [572] and carry away."

THE COURT: The indictment charges it's a felony.

MR. KLOCH: Right.

THE COURT: What about the conviction?

MR. KLOCH: Some of the other convictions do have a place on the form itself for a felony or a misdemeanor. This form does not, but looking at the plain meaning of these two pages, I can't imagine the procedure being much different in North Carolina than it is here. If the indictment is for a felony and then on the commitment he's

committed to prison, not to jail, I think the meaning of the two pages indicates that the larceny is a felony.

THE COURT: All right.

What about the last point raised by Mr. Long? Is this commitment for this indictment and, if so, how do we know that from the certificate that is attached?

MR. KLOCH: I think it tells you what the case numbers are, and, first of all, it's the same individual, the time sequence is the same, the charges are the same, one page is right after another. I think that any plain reading of these documents would not lead one to believe there are any different charge.

MR. LONG: For the purpose of the record, and, [573] obviously, this is as far as the new statute we're dealing other, but it seems to me that when the Legislature makes a distinction beyond a reasonable doubt, it doesn't mean what the procedure was in 1964. The commonwealth, with all of its resources, could have come before this court to clarify this confusion. I don't see the numbers on the first page that Mr. Kloch referred to that refers to the second page. Maybe I can't read, but I don't see two numbers that make it the same.

For him to come in—and he'd have to show a record upon which the jury could authoritatively say this man is such and such based on his record. You know, Mr. Kloch knows and I know that an indictment is not a record of conviction. An indictment is merely a charge and people in this court, as well as, I am sure, in North Carolina have indictments numerous times and never have a conviction.

THE COURT: I'm agreeing if all he had was the indictment, that would be grossly insufficient.

MR. LONG: If you look at the entire page which has both of the other charges in here—

THE COURT: I'm coming to that. Let's dispense with the first one.

MR. LONG: What I'm saying, the first one doesn't [574] correspond with the third page or the fourth page or the fifth page.

THE COURT: But they're different charges.

MR. LONG: They might be. What I'm saying, we ought to be sure when we're dealing with the issue of reasonable doubt.

Another issue, the indictment itself is not admissible, we're concerned with the criminal conviction.

THE COURT: Have you read the indictment together with the commitment? I would agree there if we had no commitment or just one of conviction. The indictment standing alone would not be admissible, but read together.

MR. LONG: The judgment of commitment was entered in 1972 and that doesn't have the indictment attached to it. The commitment is very clear. It says that's he convicted of violation of law and of a felony.

THE COURT: We haven't got to that one yet.

MR. LONG: This is only an indictment attached for some reason.

MR. KLOCH: In 1972, it has the indictment.

THE COURT: Let's go through them one at a time. Now, the third page was a warrant for a misdemeanor and the judgment is at the foot of the warrant. Do you have any [575] objection to this one, Mr. Long?

MR. LONG: Standing by itself, the third page?

THE COURT: Together with the certificate.

MR. LONG: With the certificate, no objection to that.

THE COURT: All right.

And the next one is also a warrant for a misdemeanor. That was with a dangerous weapon, and do you have any objection to this one?

MR. LONG: No.

THE COURT: The next one is a commitment without an indictment and which it is not indicated whether a felony or a misdemeanor. I don't know that that is necessarily fatal.

MR. LONG: The fifth page, Your Honor? I think at the bottom it says misdemeanor.

THE COURT: Page 5, yes. Do you have any objection to this one?

MR. LONG: No. It indicates at the bottom it's a misdemeanor.

THE COURT: All right.

And the next one is assault with the intent to kill and that goes with the judgment of commitment that [576] follows.

MR. KLOCH: Yes. It just so happens there's a two-year interval between when he did this and when he was ultimately sentenced.

MR. LONG: And it just happens that they're each numbered the same. It indicates they are the same.

THE COURT: All right.

And following this is the one you object to, the first one, is that correct?

MR. LONG: That's correct, Your Honor.

MR. KLOCH: There's two others.

THE COURT: There are?

MR. KLOCH: We didn't go through all of them.

THE COURT: Let's mark this first group and let's see how I rule before we do that. Maybe we can separate them.

MR. LONG: For simplistic's sake, maybe we can just number them, 1, 2, 3.

THE COURT: Is there any objection to the second one?

MR. LONG: Which one are we referring to as the second one?

THE COURT: The simple assault and assault and [577] battery.

MR. LONG: No. 70-C, the first paragraph? 70-CR 8275. No objection to that.

THE COURT: All right. That will be admitted. And what is the third one, Mr. Kloch? We'll come back to the one you made objection to.

MR. KLOCH: This is the escape charge.

MR. LONG: This is a misdemeanor.

MR. KLOCH: It says misdemeanor on there.

MR. LONG: Look at the complaint section.

MR. KLOCH: I agree that's a misdemeanor. It is written on the face of it misdemeanor.

MR. LONG: The complaint is erroneous.

THE COURT: It says misdemeanor.

MR. LONG: It says unlawfully, willfully, maliciously—

THE COURT: That is stricken out on mine.

MR. LONG: The complaint is what you're looking at?

THE COURT: Yes.

MR. LONG: We must be looking at different pages. This is near the end of the typewritten part.

THE COURT: It is stricken out on the printed part.

[578] MR. KLOCH: I would concede that's a misdemeanor, Your Honor.

THE COURT: All right. Any objection to this one?

MR. LONG: No, Your Honor, if that is stricken out, the feloniously, no objection.

THE COURT: By agreement.

MR. KLOCH: By agreement, Your Honor.

MR. LONG: We can have the Court do it by agreement at no objection.

THE COURT: Where it says feloniously, where it's typed in?

MR. LONG: Yes, Your Honor.

THE COURT: It's agreed that will be stricken.

MR. KLOCH: Yes.

THE COURT: All right. So those two are agreed to be admitted.

Let's turn back to that one—

MR. LONG: There's one more.

MR. KLOCH: No, this is all.

THE COURT: What's the next commonwealth exhibit?

THE CLERK. Eighteen.

THE COURT: All right. The Conviction File No. 70-CR 8075 will be Commonwealth's Exhibit 19. The next one [579] will be admitted as Commonwealth's 20.

(The documents previously referred to were marked as Commonwealth's Exhibit No.s 19 and 20 for identification and received in evidence.)

THE COURT: All right. This other one, let's don't mark it until I rule on it.

Let's return to the indictment and commitment on the first set of papers.

Mr. Kloch, what indicates that this is the indictment that corresponds to this commitment?

MR. KLOCH: Your Honor, I think, obviously, everything is circumstantial in this case, but, first of all, the certification talks about document numbers and one of them being 9618, and it mentions one other number and these correspond with the remaining documents of these seven pages. It was the same prosecutor, the same charge, the same two charges, approximately the same period of time and it happened on December 12th, and he was indicted in February in a regular criminal term. It says felony, committed to prison. I suppose anything is conceivable, but I think the plain reading of these two documents and the certification—[580] in plain reading these two documents, they belong together.

THE COURT: What is the number that appears on the warrant for assault?

MR. LONG: There's no number on it either, Your Honor.

THE COURT: I'm trying to see what the certification refers to by number.

MR. KLOCH: Your Honor, it seems to me—and counsel may correct me—but his argument is whether it is a misdemeanor or a felony. That is how counsel objected to start out.

THE COURT: Whether this is the warrant that goes with this judgment and commitment. If this indictment goes with this judgment and commitment.

MR. LONG: That's essentially it.

MR. KLOCH: This is a breaking and entering and larceny.

MR. LONG: I'd be more than happy to tear it off right now, but how can you refer to the jury and say that 9618 is a felony? It doesn't have anything at the bottom and all the others do It doesn't say if a felony or a misdemeanor.

THE COURT: What about that, Mr. Kloch?

[581] MR. KLOCH: Your Honor, I think that they've got to be read together. The Court will have to rule.

THE COURT: I'm satisfied that when you read the two together along with the certification of the Superior Court and the judge of the 10th Judicial District the indictment is the indictment that corresponds with the judgment and the commitment. The objection is overruled.

MR. LONG: If I may state for the record, not only are they not referred to by number, but circumstantially it is not proper argument; but the documents speak for themselves.

THE COURT: I agree with that. You have to read them, and whatever appears on the face of them, as well as what appears on the certification.

MR. LONG: For the purpose of the record, I make that objection, but I think that when you're dealing with something as critical as the defendant's prior record and it's going one way or the other whether he receives life or death, that the commonwealth has got to do more than what they've done here. They could have been numbered; they must be numbered. The file must be numbered. You just can't pull it out from nowhere. There are no numbers for the record and no connection as to the two other than the fact they are [582] stapled together.

THE COURT: Except for the certification of the clerk which states the foregoing and a copy of the indictment, the warrant and the judgment and the commit-

ment and it makes reference to 96.8. The clerk has certified this is the indictment that corresponds to 96.8.

Given that certification, notwithstanding the fact that the indictment does not have a number on it, I'm satisfied as to its admissibility.

MR. LONG: I object to it.

THE COURT: All right, sir.

Make that the next number if you will, please.

THE CLERK: Twenty-one.

THE COURT: All right.

(The document previously referred to was marked Commonwealth's Exhibit No. 21 for identification.)

* * * *

[FROM SUMMATION OF JOHN KLOCH]

[600] Now, there is, I think, an honest natural resistence to giving the death penalty. All of you have stated that you could under the right circumstances sentence another person to death. I say to you it is evidently clear, it is obvious life imprisonment is not open to this man. By his past behavior, by his promises, whether it be another inmate, whether it be another guard, whether it be an innocent bystander, such as Patty Warren, whether it be a police officer, life imprisonment would not end the violence based on what we know about Wilbert Evans and what you've heard here from the stand and what you'll have the oppotunity, to read in those documents.

* * * *

[FROM REBUTTAL OF JOHN KLOCH]

[605] MR. KLOCH: I don't think counsel has answered the basic concern of the Legislature on how we, the citizens, how society now protects itself. Who will be the next guard, the next policeman? How do you reconcile the fact that William Truesdale, a law enforcement officer, is dead as a rstult of the intended purpose of Wilbert Lee Evans? How do we protect [606] ourselves? Life imprisonment? No. Life imprisonment only means he will have another opportunity as a promise to the next guard, and as touchy a solution as death is, it is the only solution and you're the ones to effect that solution.

* * * *

DISTRICT NO. 36
PRE-SENTENCE REPORT

Prepared By: Ms. Linda V. Jacobson, Chief
Mr. Frederick M. Rockwell Probation and Parole Officers
Date Typed: 5-12-81

CIRCUIT COURT OF ALEXANDRIA

Name: Wilbert Lee Evans
TN: Wilton Leon Evans

AKA:
Leon Evans, Charles Smith, "Big Lee" and "Smitty"

Present Address:
Powhatan County Jail
Powhatan, Virginia

Permanent Address:
3905 13th Street, N.W.
Washington, D.C.

Age: 35 DOB: 1-20-46

Place of Birth:
Raleigh, North Carolina

Sex: Male

Race: Black

Marital Status:
Married-Separated

Dependents: Two

Social Security No.:
Unknown

Judge: Honorable Wiley R. Wright, Jr.

Commonwealth Attorney: Mr. John Kloch

Defense Attorney: Mr. Stefan C. Long (Court Appointed)
Mr. E. Blair Brown (Court Appointed)

Tried By: Jury Trial Date: 4-17-81 Date of Disposition: 5-21-81

Offense(s): Murder
Firearm Violation
Indictment No. (c): F-5105

Plea(s): Pled Not Guilty to Murder
Pled Not Guilty to Firearm Violation

Verdict(s): Found Guilty of Murder: Jury recommended the death penalty.
Found Guilty of Firearm Violation: Jury recommended one (1) year.

Custody Status: In custody since 1-28-81 at the Powhatan County Jail.

Jail Adjustment: Powhatan facility records reflect no adverse reports.

Codefendant(s): None Disposition of Codefendant(s): N/A

* * * *

NAME: Wilbert Lee Evans

TN: Wilton Leon Evans

AKA: Leon Evans, Charles Smith,
Wilbert Lee Evans, Wilbur Lee Evans,
Wilbert Leon Evans, "Big Lee", "Smitty"

SEX: Male

RACE: Black

DOB: 1-20-46

SSN: Unknown

PRIOR RECORD:

FBI:	#215967 E	CCRE: #990020	
2-27-62	Ident. Raleigh, N.C.	Disch. Firearms in City	30 days SS for 1 yr.
6-24-62	" "	AWDW	6 mos. SS, 2 yrs pro
7-16-63	Rec. Sec. Raleigh, N.C.	Engaging in An Affray	1 month
2-24-64	Rec. Sec. Raleigh, N.C.	BE & L AWDW	6 mos. 6 mos. conc.
10-5-64	Rec. Sec. Raleigh, N.C.	Assault on Officer Affray with a Deadly Weapon	Nolle 4 mos.
6-3-65	Rec. Sec. Raleigh, N.C.	Assault and Battery Disorderly Conduct Resisting Arrest Breaking Arrest	6 mos.
10-6-66	Rec. Sec. Raleigh,	B & E Coin Machine	4 mos.
3-2-67	Rec. Sec. Raleigh, N.C.	Assault and Battery Disorderly Conduct	30 days 30 days exp.
12-6-67	PD Washington, D.C.	Disorderly Conduct	Unknown
2-23-68	D.C. Jail, Washington, D.C.	Petit Larceny Assault	360 days 360 day cons.
12-17-70	Dept. Corr. Raleigh, N.C.	Larceny A & B AISD	18 mos. 60 day Conc.

6-23-72	D.C. Jail Wash. D.C.	Fugitive from Justice	
7-12-72	Dept. of Corr. Raleigh, N.C.	Escape	3 mos. Exps of 1
9-27-72	Dept. of Corr. Raleigh, N.C.	Assault With A Deadly Weapon Inflicting serious Injury	4-5-years on 1 & 3 conc.
2-7-78	U.S. Attorney Washington, D.C.	Assault With a Deadly Weapon (2 cts)	Dismissed
11-8-80	PD Alexandria, VA	Fugitive From Justice	
11-11-80	B of 1 Raleigh, N.C.	Murder Armed Robbery	Pending
1-27-81	PD Alexandria, VA	Murder Firearm Violation	Instant Offense

DISTRICT OF COLUMBIA POLICE RECORDS:

6-22-72	Dis. Crops	Dispo Unknown

RALEIGH, NORTH CAROLINA POLICE RECORDS:

8-17-63	Affray	Judgment Absolute
2-20-66	Damage of Property	Dispo. Unknown
3-14-66	Capias	Dispo. Unknown
3-14-66	Damage to Property	25 days Susp. Costs Pd.
9-11-66	Assault and Battery	Dispo. Unknown
10-1-66	Breaking and Entering	Dispo. Unknown
1-6-67	Gambling	Dispo. Unknown
1-21-67	Disorderly Conduct	Dispo. Unknown
	Assault	Dispo. Unknown
2-27-67	Fail to Comply	Dispo. Unknown
2-27-67	Capias	Dispo. Unknown
12-9-70	Carrying a Concealed Weapon	Dispo. Unknown
7-31-74	Civil	Dispo. Unknown

NOTE: According to family members and the subject, *Wilton Leon Evans* is the defendant's legal, Christian name as recorded in church and birth records. For some inexplicable reason, the subject was incorrectly called *Wilbert Lee* and most of his legal and school records would so reflect. Further complicating the records was the birth of a younger brother legally named *Wilbert Lee*.

The defendant indicates that there has been no confusion within the legal system, reference the similar names and, after studying the FBI record sheet, Mr. Evans confirmed responsibility for all charges listed on FBI 215 967 E.

/s/ Linda V. Jacobson,
LINDA V. JACOBSON, Chief
Probation and Parole Officer
District #36

/s/ Frederick M. Rockwell
FREDERICK M. ROCKWELL
Probation and Parole Officer
District #36

FMR/dbv

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia
Monday, June 1, 1981

The proceedings commenced at 9:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

JOHN E. KLOCH, ESQ., Commonwealth Attorney

STEFAN C. LONG, Esq., and E. BLAIR BROWN, Esq., Moncure, Long & Brown, 121 South Royal Street, Alexandria, Virginia 22314, counsel for the defendant.

[3] PROCEEDINGS

Whereupon, the court reporter was sworn in.

THE CLERK: F-5105. The Commonwealth of Virginia versus Wilbert Lee Evans. John Kloch for the Commonwealth, Stefan Long and Blair Brown for the defendant.

MR. LONG: Ready for the defendant, Your Honor.

MR. KLOCH: Ready for the Commonwealth, Your Honor.

THE COURT: Have you gentlemen received the report made pursuant to the provisions of Code Section 192-264.5?

MR. LONG: Yes, we have received a copy that was forwarded by the Probation Department. I think Mr. Evans, he has received it and he has been given at least two opportunities to make supplements thereto. I have a supplement as Your Honor is aware and we have discussed it this morning with him, not in great detail, but we would ask for additions or deletions of statement concerning the contents thereof.

THE COURT: Do you need any additional time to review it with the defendant?

MR. LONG: No, Your Honor. I would indicate to the Court that we have had sufficient time to review it with him. We are prepared to go forward with him at this time.

* * * *

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA

vs.

WILBERT LEE EVANS,
Defendant.

ORDER

THIS DAY came the Attorney for the Commonwealth and the defendant, Wilbert Lee Evans, true name Wilton Leon Evans (DOB 1-20-46), who stands convicted of two felonies, to wit: Count I: Capital Murder and Count II: Firearm Violation, was led to the Bar in the custody of the Sheriff, and came also Stefan C. Long and E. Blair Brown, his counsel heretofore appointed.

And the probation officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written post-sentence report made pursuant to Section 19.2-264.5, Code of Virginia, 1950, as amended, which report he presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon, the defendant and his counsel were given the right to cross-examine the probation officer as to any matter contained in said report and to present any additional facts bearing upon the matter as they desired to

present. The report of the probation officer is hereby filed as a part of the record in this case.

Whereupon, the Court, taking into consideration all of the evidence in the case, the report of the probation officer, the matters brought out on cross-examination of the probation officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, in accordaonce with the verdict of the jury, the Court finds the defendant guilty of Capital Murder as charged in Count I of the indictment and sentences the defendant to death and fixes the date on which execution shall occur at September 1, 1981. . . .

ENTERED the 1st day of June, 1981.

/s/ Wiley R. Wright, Jr.
WILEY R. WRIGHT, Jr., Judge

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 811056

WILBERT LEE EVANS,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF ON BEHALF OF THE COMMONWEALTH

J. MARSHALL COLEMAN
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

* * * *

III

THE VERDICT OF THE JURY ON SENTENCE WAS NOT IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE AND OTHER ARBITRARY FACTORS, AND THE DEATH SENTENCE IN THE INSTANT CASE IS NOT DISPROPORTIONATE AND EXCESSIVE TO THE PENALTY IMPOSED IN SIMILAR CASES UNDER VIRGINIA LAW.

The jury found that after consideration of the defendant's prior record there existed a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society. (App. 9). Accordingly, the jury set his punishment at death.

The defendant's previous criminal records submitted to the jury at the penalty phase were Commonwealth's Exhibits 19, 20 and 21. These records revealed the following past convictions and sentences:

Convictions	(Date & type of conviction)	Sentences
1. Feb. 21, 1964 (See Commonwealth's Exhibit 21; Supp. App. 5-6)	—"Breaking, Entering & Larceny"	"6 months"
2. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 7)	—Assault on a police officer with a deadly weapon while the officer was in the performance of his duties.	"6 months on road"
3. July 26, 1964 (See Commonwealth's Exhibit 21; Supp. App. 8)	—Engaging in an affray with a deadly weapon	"6 months on road" to run consecutively with other sentence of same date.

Convictions	(Date & type of conviction)	Sentences
4. September 30, 1964 (See Commonwealth's Exhibit 21; Supp. App. 9)	—Engaging in an affray with a deadly weapon	"4 months"
5. Dec. 15, 1970 (See Commonwealth's Exhibit 19; Supp. App. 10-11)	—"Assault & Battery & Assault Inflicting Serious Damage" (hitting victim in the face with his fist, breaking his nose and knocking one tooth out) (misdemeanor)	60 days
6. July 12, 1972 (See Commonwealth's Exhibit 20; Supp. 12-13)	—Escape from N.C. Penitentiary	3 months
7. Sept. 27, 1972 (See Commonwealth's Exhibit 21; Supp. App. 14)	—Assault with a deadly weapon inflicting serious injuries	Not less 4 years nor more than 5 years.

Most of the foregoing offenses—even though many were misdemeanors—involved serious violence to other human beings. Four offenses concerned use of a deadly weapon, and indeed one of those four convictions was for assault on a police officer with a deadly weapon while that officer was in the performance of his duties. One conviction was for escape from the North Carolina Penitentiary. (See Supp. App. 5-14).

Obviously the jury was not required to consider these prior convictions in a vacuum but rather in the light of the characteristics of the instant capital murder and the defendant's state of mind and attitude toward society and his fellow man as revealed by his own actions and statements.[7] In this light the defendant's criminal record

[7] Under the Virginia statute, § 19.2-264.2, prior criminal conduct is "the principal predicate for a prediction of further 'dangerousness.'" *Smith* v. *Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135

reveals that he has a deep-seated and callous disregard for human life and rules of society.

* * * *

The record certainly sustains the jury's conclusion that there is a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society.

* * * *

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

/s/ Jerry P. Slonaker
JERRY P. SLONAKER
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

[September 4, 1981]

(1978), *cert. denied*, 441 U.S. 967 (1979). The jury, however, must consider all of the relevant evidence before determining whether the defendant has such a propensity to violence as to make him a menace to society. *Stamper* v. *Commonwealth*, 220 Va. 260, 275-277, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 8-6131

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Upon A Petition For Writ Of Certiorari To The
Supreme Court of Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Sixth Floor
Richmond, Virginia 23219

* * * *

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans' convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	—Breaking, entering and larceny	—6 months
July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date
September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
July 12, 1972	—Escape from North Carolina Prison System	—3 months
September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

Included in the jury instruction, all of which were unchallenged on appeal (See Appendix a at 9), was Instruction No. 14 stating in the alternative what the Commonwealth had to prove before the jury could fix Evans' punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court; first, whether Evans' "past criminal record," to

which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans' record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans' past criminal record which it could consider was contained in Exhibits 19, 20, and 21. (April 17 tr. 610-611). Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans' punishment at death.

* * * *

The facts in this case show that petitioner Evans had "a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence." (Appendix a at 14). As the Virginia Court below noted, although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One such offense was assaulting a police officer with a knife while that officer was in the performance of his duties. Another offense was for escape from the North Carolina prison system.

The jury could consider Evans' past criminal record together with the circumstances of the murder of Deputy Sheriff Truesdale in determining whether he would probably commit other crimes of violence.

* * * *

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

/s/ Jerry P. Slonaker
JERRY P. SLONAKER
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Counsel of Record

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[March 1, 1982]

VIRGINIA

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

WILBERT LEE EVANS,
#124549
Petitioner

v.

J.P. MITCHELL, Superintendent,
Virginia State Penitentiary,
Richmond, Virginia,
Respondent

PETITION FOR A WRIT OF HABEAS CORPUS

The petitioner, WILBERT LEE EVANS, by counsel, alleges in this petition that he is currently illegally held under imminent sentence of death, in violation of the Constitutions of the Commonwealth of Virginia and of the United States.

* * * *

16. After a verdict of capital murder was returned, a separate sentencing proceeding was held, pursuant to § 19.2-264.4 of the Code of Virginia. At the hearing, the Commonwealth presented the testimony of a police officer concerning post arrest statements made by the petitioner, including the statement that he had planned to escape and "it mattered not to him who was in his way." The other evidence consisted of certified copies of records proporting to be prior convictions and sentences received by the petitioner. This included:

February 21, 1964	—Breaking, entering and larceny	—6 months
July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date
September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
July 12, 1972	—Escape from North Carolina Prison System	—3 months
September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

The defense offered no evidence whatsoever.

PETITIONER'S CLAIMS

17. Petitioner's trial counsel failed to provide representation within the range of competence demanded of attorneys in criminal cases, particularly in capital cases. Petitioner was therefore denied adequate and effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I § 8 of the Constitution of Virginia. This failure included, but was not limited to, the following ommissions at the sentencing phase of the trial:

a. The complete and utter failure to present any evidence at the sentencing phase;

b. The failure to object to Commonwealth's exhibits 19, 20, and 21 (purported convictions of the defendant), on the ground that such records were insufficient as a matter of law, some even lacking the signature of the judge allegedly finding guilt;

c. The failure to object to the admission of the proported convictions as remote (four were seventeen years old, one was eleven years old and the final two were nine years old), and of little probative value;

d. The failure to object to the admission of multiple copies of some of the proported convictions;

e. The failure to object to the admission of indictments and other charging documents along with the records of convictions, or to explain that what the jury received were charging documents, which left the impression that many more crimes had been committed by the petitioner;

f. The failure to object to the admission of charging documents which indicated in some cases that the defendant had been charged with more serious crimes than he was convicted of, for example, an indictment of assault with intent to kill where conviction was for assault inflicting serious injuries;

g. The failure to attempt to explain or produce evidence concerning the nature of the petitioner's past offenses.

* * * *

WILBERT LEE EVANS
By Counsel

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[April 9, 1982]

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

WILBERT LEE EVANS, #124549
Petitioner,

vs.

J. P. MITCHELL, Superintendent,
Virginia State Penitentiary,
Richmond, Virginia,
Respondent.

AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

The petitioner, WILBERT LEE EVANS, by counsel, alleges in this petition that he is currently illegally held under imminent sentence of death, in violation of the Constitutions of the Commonwealth of Virginia and of the United States.

* * * *

16. After a verdict of capital murder was returned, a separate sentencing proceeding was held, pursuant to § 19.2-264.4 of the Code of Virginia. At the hearing, the Commonwealth presented the testimony of a police officer concerning post arrest statements made by the petitioner, including the statement that he had planned to escape and "it mattered not to him who was in his way." The other evidence consisted of certified copies of records proporting to be prior convictions and sentences received by the petitioner. This included:

February 21, 1964	—Breaking, entering and larceny	—6 months
July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date
September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
July 12, 1972	—Escape from North Carolina Prison System	—3 months
September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

The defense offered no evidence whatsoever.

PETITIONER'S CLAIMS

17. Petitioner's trial counsel failed to provide representation within the range of competence demanded of attorneys in criminal cases, particularly in capital cases. Petitioner was therefore denied adequate and effective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I §§ 8 and 9 of the Constitution of Virginia. This failure included, but was not limited to, the following omissions at the sentencing phase of the trial.

* * * *

h. The failure to object to the admission of a record of conviction in a case where, in fact, the charge had

been *nolle prossed*, and there was *no* conviction. This was particularly egregious since the alleged offense was assault on a police officer with a deadly weapon, since the "order of conviction" was not in fact signed, since it had not been included on the defendant's FBI rap sheet, nor on other records of his prior convictions provided during pretrial discovery;

i. The failure to object to the admission of a record of a prior conviction for engaging in an affray with a knife from the City Court of Raleigh (now the District Court), which had been appealed to the Superior Court for Wake County, resulting in a trial *de novo*. The record of conviction for that second trial was also introduced, leading the jury to believe that there had in fact been two separate convictions. No attempt was made to explain this fact to the jury;

j. The failure to attempt to explain or produce evidence for the jury concerning the nature of the petitioner's past offenses.

* * * *

18. The failures set out above were exacerbated by the following failures of trial counsel at and before the sentencing hearing on June 1, 1981, when the Court imposed the jury's sentence of death:

* * * *

d. The failure to point out to the Court at the June 1 hearing that at least one of the convictions considered by the jury at the sentencing phase, assault on a police officer with a deadly weapon, had in fact been *nolle prossed*, as indicated on the presentence report, and the failure to request a mistrial or new trial on that ground.

* * * *

26. It was error, and a violation of the petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constiotution, and Article I, §§ 8 and 9 of the Constitution of Virginia, to allow the jury to con-

sider Commonwealth's Exhibits 19, 20 and 21 (the alleged "prior convictions" and related documents), when they were remote, erroneous, improperly prejudicial, duplicative and suffering from the defects set out in paragraphs 17 (c), (d), (e), (f), (g), (h) and (i).

27. In deciding to impose the death sentence, the jury relied upon at least one record of "conviction" (assault on a police officer with a deadly weapon) of which the petitioner had in fact not been convicted. The Commonwealth knew or should have known this. Their use of it despite this knowledge violated the petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and under ARticle I, §§ 8 and 9 of the Constitution of Virginia.

* * * *

WILBERT LEE EVANS
By Counsel

/s/ Jonathan Shapiro
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[May 5, 1982]

June 1, 1982

Jerry Slonaker
Assistant Attorney General
Office of the Attorney General
101 N. 8th Street
Richmond, Virginia 23219

Re: *Evans* v. *Mitchell*

Dear Jerry:

Enclosed are the documents we spoke about today. They indicate that the charge of assault on a police officer was not pursued at the Circuit Court level.

As I mentioned, I believe that this single error requires some relief for Evans. I feel that many of the other trial errors we've alleged are also substantial. I am most anxious to speak with you about this in the future.

Very truly yours,

JONATHAN SHAPIRO

cc: Kenneth Labowitz, Esq.

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

No. 7371

WILBERT LEE EVANS,
#124549,
Petitioner,

vs.

J.P. MITCHELL,
Superintendent, Virginia State Penitentiary,
Richmond, Virginia,
Respondent.

PETITIONER'S BILL OF PARTICULARS

The petitioner, Wilbert Lee Evans, sets forth the following particulars concerning the claims in his amended complaint:

1. "The specific evidence that was available for presentation at the sentencing phase of the trial which defense counsel did not present, and whether petitioner brought such evidence to the attention of his attorneys. (See allegation 17(a) of the amended petition).

ANSWER: The following evidence was available for presentation to the jury at the sentencing phase of petitioner's trial:

* * * *

h. A certified abstract of proceedings before the Superior Court for Lake County, North Carolina, indicating that petitioner was not convicted of assault on a police

officer, and that in fact, the charge was nolle prossed. Had objection been made to introduction of this proported conviction, and had it been sustained, this document would not have been offered into evidence.

i. The testimony of the Clerk of Court of the Superior Court of Wake County, North Carolina, or his duly authorized representative. This official could have explained to the jury that:

1. The July, 1964 conviction for assault on a police officer with a deadly weapon had been nolle prossed upon appeal;

2. That the July, 1964 conviction for an affray with a deadly weapon was appealed, resulting in a trial de novo, thus making the conviction in the City Court of Raleigh a nullity;

3. That the "Commitment to State Prison" dated February 21, 1964, (part of Commonwealth's Exhibit 21) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

4. That the "Commitment to State Prison Department Prison Unit" form dated September 30, 1964, was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

5. That the "Judgment and Commitment" form dated December 15, 1970 (part of Commonwealth's Exhibit 19) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

6. That the two, single column "Judgment" forms dated December 15, 1970 (part of Commonwealth's Exhibit 19) were for the same offense, and were for an offense reflected in another document presented to the jury, and were not for separate offenses;

7. That the "Judgment and Conviction" form dated July 12, 1972 (part of Commonwealth's Exhibit 20) was

for an offense reflected in another document presented to the jury, and was not a separate offense;

8. That the "Indictment—Assault With Intent To Kill", undated, was the charging document for an eventual conviction for assault with a deadly weapon inflicting serious injuries, itself reflected in a second document dated September 27, 1972, received by the jury, and was not a separate offense.

All of the above information (a-i) was known to, should have been known to, or was brought to the attention of trial counsel by the petitioner and was available at the time of the sentencing hearing.

j. Other evidence which is presently unknown to counsel, but which was or should have been known to trial counsel, which was available at the time of the sentencing hearing, and which will be made known to counsel for the respondent as soon as it may be discovered.

2. "The specific evidence that defense counsel should have presented to the jury concerning the nature of petitioner's past offenses, and whether petitioner brought such evidence to the attention of his attorneys. (See allegation 17(j) of the amended petition).

Petitioner adopts the answer set forth in paragraphs 1(a-i).

In addition, the petitioner could have testified about the valid previous convictions himself. Concerning the 1964 Breaking and Entering, and Larceny convictions, petioner would have informed the jury that he had been 16 years old at the time, and that the offense involved the theft of candy. Concerning the July, 1964 affray with a weapon, and the December 1970, assault, the petitioner would have testified that this was a result of a provoked fight arising over gambling. Further, he would have testified that the other assault charges in December,

1970 arose out of the very same incident. He would have testified that the escape charge involved simply walking away and not returning while on a pass, and that it was not a violent escape from confinement. Finally, he could have testified that the November, 1969 assault conviction was for a fight which began during a basketball game in which he was playing. All of this information was brought to the attention of trial counsel by the petitioner.

* * * *

Respectfully submitted,

WILBERT LEE EVANS
By Counsel

Counsel for Petitioner:

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[July 6, 1982]

November 17, 1982

Jerry P. Slonaker, Esquire
Assistant Attorney General
Office of the Attorney General
101 North 8th Street
Richmond, VA 23219

RE: *Evans* v. *Mitchell*

Dear Jerry:

Just to follow-up on our telephone conversation of several days ago, I have written to the Clerk in Wake County, North Carolina, for confirmation of those records I've provided to you. I did that some time ago and have not yet heard back. My guess is that they are tired of our requests for information, and, that the written record is perfectly clear on its face—the assaulting charge was *nol prossed*. Please let me know if we can stipulate to that and to the fact that the Evans jury also received both the district court *and* the circuit court convictions (the latter on a trial *de novo* of the former) for a charge of assault.

Very truly yours,

JONATHAN SHAPIRO

JS:cjm

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OR ALEXANDRIA

No. 7371

WILBERT LEE EVANS,
Petitioner,

-vs-

J. P. MITCHELL, WARDEN,
VIRGINIA STATE PENITENTIARY,
Respondent.

MOTION FOR LEAVE TO AMEND

The petitioner, Wilbert Lee Evans, requests leave of the Court to amend his Amended Petition For a Writ Of Habeas Corpus, in the following respects:

1. To amend paragraph 17 by adding the following language.

   17(*n*) The failure to investigate and discover that one or more of the "convictions" the Commonwealth would rely upon at sentencing were invalid under the doctrines of *Burgett* v. *Texas* 389 U.S. 109 (1967), *Argesinger* v. *Hamlin*, 406 U.S. 25 (1972), *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) and then the failure to object to the use of those "convictions" at the sentencing phase under those doctrines.

* * * *

3. To amend paragraph 27 as follows:

27(a) In deciding to impose the death sentence, the jury relied upon at least [one] two prior [records of] "convictions" (assult on a police officer with a deadly weapon[)] and engaging in an affray with a knife) [of] which [the petitioner had in fact not been convicted] were void. The Commonwealth knew or should have known this. The Commonwealth also knew or should have known that one or more of the convictions introduced at the sentencing phase were invalid because they had been obtained without benefit of counsel and without a waiver of counsel. Their use of [it] those convictions despite this knowledge violated the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, [and] under Article I, §§ 8 and 9 of the Constitution of Virginia, and under the doctrine of *Burgett* v *Texas* 389 U.S. 109 (1967), *Argesinger* v *Hamlin*, 407 U.S. 25 (1972), and *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

(b) Likewise, the Commonwealth violated the petitioner's constitutional rights under the doctrines of *Brady* v *Maryland*, 373 U.S. 83 (1963) and *Mooney* v *Holohan*, 294 U.S. 103 (1935) and their progeny, by failing to disclose to defense counsel the flaws in the "convictions" they intended to use (as noted above) at the petitioner's sentencing.

4. To amend paragraph 26 as follows:

26. It was error, and a violation of the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 8 and 9 of the Constitution of Virginia, to allow the jury to consider Commonwealth's Exhibits 19, 20, and 21 (the alleged "prior convictions" and related documents), when they were re-

mote, erroneous, improperly prejudicial, duplicative and suffering from the defects set out in paragraphs 17 (c), (d), (e), (f), (g), (h) and (i) and (n).

* * * *

A copy of the propsoed Second Amended Petition For A Writ Of Habeas Corpus is attached to this pleading.

* * * *

For these reasons, leave is requested to amend the petition, as set out above.

Respectfully submitted,

WILBERT LEE EVANS

By Counsel

Counsel for the Defendant:

/s/ Jonathan Shapiro
JONATHAN SHAPIRO
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[December 22, 1982]

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

No. 7371

WILBERT LEE EVANS,
Petitioner,

-vs-

J. P. MITCHELL, WARDEN,
VIRGINIA STATE PENITENTIARY,
Respondent.

ORDER

Upon motion of counsel for the petitioner for leave to amend his Amended Petition For A Writ Of Habeas Corpus, and deeming it just and proper to do so, it is hereby

ORDERED and ADJUDGED, that leave is hereby granted petitioner to amend his Amended Petition For A Writ Of Habeas Corpus as set out in his motion. The Clerk shall hereby file the Second Amended Petition For A Writ Of Habeas Corpus which counsel has attached to his Motion For Leave To Amend. Respondent shall file an Answer within 60 days from the date of this order.

Enter: January 5, 1983

/s/ Wiley R. Wright, Jr.
JUDGE OF THE CIRCUIT COURT

I ask for this:

/s/ Jonathan Shapiro
JONATHAN SHAPIRO
JONATHAN SHAPIRO AND ASSOCIATES, P.C.
108 North Columbus Street
Alexandria, Virginia 22314
(703) 684-1700

Seen and Agreed:

/s/ Jerry Slonaker
JERRY SLONAKER, ESQUIRE
Assistant Attorney General
Counsel for Respondent.

[Stamp Mark:
Received,
Jan. 24, 1983]

[LOGO]

General Court of Justice
10th Judicial District

J. Russell Nipper, Clerk
Ex Officio Judge of Probate

CLERK SUPERIOR COURT
WAKE COUNTY
P.O. Box 351
Raleigh, North Carolina
27602-0351

January 19, 1983

Mr. Jerry P. Slonaker
Assistant Attorney General
Criminal Law Enforcement Division
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

RE: Wilbert Lee Evans

Dear Mr. Slonaker:

In answer to your letter of January 11, 1983, and the copy of your letter of December 1, 1982 I am enclosing a copy of my letter to Mr. Jonathan Shapiro as well as returning your copy of the letter from Mr. Shapiro. I believe thest two copies will answer part of your questions.

You will note on page one of Mr. Shapiro's letter the case No. 10494 of September 30, 1964 "engage in affray; affray with a deadly weapon; assault on a police officer

with a deadly weapon" are all case No. 10494. The defendant entered a plea of guilty to "engaging in affray with a deadly weapon" Nol Prosse with leave was granted as to "assault on officer with a deadly weapon, all of which was entered in this court on September 29, 1964, and the defendant was sentenced to four (4) months in jail, assigned to work under supervision of State Prison Department.

I hope this information is sufficient, if not, please advise.

Sincerely,

/s/ J. Russell Nipper
J. RUSSELL NIPPER
Clerk Superior Court

JRN/bhm

[Documents at App. 79a-82a were attachments to this letter]

[LOGO]

General Court of Justice
10th Judicial District

J. Russell Nipper, Clerk
Ex Officio Judge of Probate

CLERK SUPERIOR COURT
WAKE COUNTY
P.O. Box 351
Raleigh, North Carolina
27602-0351

January 7, 1982

Mr. Jonathan Shapiro
P.O. Box 383
Alexandria, Virginia 22314

RE: Wilbert Lee Evans

Dear. Mr. Shapiro:

I am returning one of your letters dated January 3, 1983 in order to clarify the cases and case numbers of the above. During the time frame of the records spelled out in your letter it was not a statutory requirement to appoint counsel or waive counsel in misdemeanor actions.

Further, this letter is to confirm that this office has no record of counsel for the above, nor do we have a record of waiver of counsel in the subject cases.

I hope this information is sufficient.

Sincerely,

/s/ J. Russell Nipper
J. RUSSELL NIPPER
Clerk Superior Court

JRN/bhm
encl: 1

JONATHAN SHAPIRO & ASSOCIATES
Attorneys
108 North Columbus Street
P.O. Box 383
Alexandria, Virginia 22314
(703) 684-1700

January 3, 1983

Clerk
Superior Court for Wake County
Raleigh, North Carolina

Clerk
District Court for Wake County
Raleigh, North Carolina

Dear Sirs;

My firm is involved in a criminal case in Alexandria, Virginia in which a man received the death penalty in part because of convictions he had amassed in North Caorlina, from 1962 through 1972. Those convictions included a number of misdemeanors. A representative of my office inspected your records, with your gracious help, in an attempt to discover whether they reflected if counsel was appointed in those cases, or whether there was any waiver of counsel. Unfortunately, it appears that most of your pre-1972 records have been destroyed. However, someone in your office informed my associate that there was no policy of appointing counsel for indigents charged with misdemeanors during the relevant time period. I'm quite sure that is true, since this was well before it was required that counsel be appointed.

I would greatly appreciate it if you would confirm that policy for me, as well as the fact that you have no record indicating that my client, Wilbert Lee Evans, either had counsel, or waived counsel, in the following cases:

#70 CR 64042 (District Court)	July 12, 1972	Escape
#10494 (Superior Court)	September 30, 1964	Engage in an affray
#70 CR 8275 #70 CR 61546 (District Court)	December 15, 1970	Assault & Battery; Assault
# ? (District Court)	July 30, 1964	Affray with a deadly weapon; Assault on a police officer with a deadly weapon

No. 10494

STATE

vs

WILBERT LEE EVANS

Appeal: (2 Warrants) Engaging in an Affray with a Deadly Weapon

Assault on an Officer with a Deadly Weapon

The defendant in open court pleads guilty to Engaging in an Affray with a Deadly Weapon.

The Solicitor takes a Nol Pros with Leave as to the charge of Assault on an Officer with a Deadly Weapon.

Charles Lucas and Steve Adcock are sworn and examined as witnesses in behalf of the State

There were no defense witnesses put on

The Court heard the defendant.

The Judgment of the Court is that the defendant be imprisoned in the common jail of the County for a term of FOUR MONTHS and assigned to work under the supervision of the State Prison Department.

And thereupon Court takes a recess until 9:30 o'clock to-morrow morning, Wednesday, September 30th, 1964.

APPROVED:

/s/ [Illegible]
Judge Presiding

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

No. 7371

WILBERT LEE EVANS,
Petitioner,

v.

J. P. MITCHELL, WARDEN,
VIRGINIA STATE PENITENTIARY,
Respondent.

ANSWER

Now comes the respondent, by counsel, and in answer to the second amended petition for a writ of habeas corpus says as follows:

1. By leave granted to the petitioner by the Court he has filed a second amended petition for a writ of habeas corpus in which he sets forth the following additional allegations:

(1) To amend paragraph 17 by adding the following language.

17(n) The failure to investigate and discover that one or more of the "convictions" the Commonwealth would rely upon at sentencing were invalid under the doctrines of *Burgett* v. *Texas*, 389

U.S. 109 (1967), *Argesinger* v. *Hamlin*, 406 U.S. 25 (1972), *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) and then the failure to object to the use of those "convictions" at the sentencing phase under those doctrines.

* * * *

(3) To amend paragraph 27 as follows:

27(a) In deciding to impose the death sentence, the jury relied upon at least two prior "convictions" (assault on a police officer with a deadly weapon and engaging in an affray with a knife) which were void. The Commonwealth knew or should have known this. The Commonwealth also knew or should have known that one or more of the convictions introduced at the sentencing phase were invalid because they had been obtained without benefit of counsel and without a waiver of counsel. Their use of those convictions despite this knowledge violated the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, §§ 8 and 9 of the Constitution of Virginia, and under the doctrine of *Burgett* v. *Texas*, 389 U.S. 109 (1967), *Argesinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

(b) Likewise, the Commonwealth violated the petitioner's constitutional rights under the doctrines of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Mooney* v. *Holohan*, 294 U.S. 103 (1935) and their progeny, by failing to disclose to defense counsel the flaws in the "convictions" they intended to use (as noted above) at the petitioner's sentencing.

(4) To amend paragraph 26 as follows:

> 26. It was error, and a violation of the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8 and 9 of the Constitution of Virginia, to allow the jury to consider Commonwealth's Exhibits 19, 20, and 21 (the alleged "prior convictions" and related documents), when they were remote, erroneous, improperly prejudicial, duplicative and suffering from the defects set out in paragraphs 17(c), (d), (e), (f), (g), (h) and (i) and (n).

* * * *

2. Respondent denies that petitioner suffered ineffective assistance of counsel as alleged in the second amended habeas corpus petition or that he is entitled to habeas relief on that ground. Such claims, however, can be best considered at a plenary hearing in this Court.

3. Respondent denies that the Commonwealth's Attorney acted improperly or that habeas corpus relief should be granted on this ground, but these claims may also be best determined at a plenary hearing.

4. No other allegations in the second amended habeas corpus petition are cognizable for the first time on habeas corpus. *See Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied, sub nom., Parrigan* v. *Paderick*, 419 U.S. 1108 (1975); Rule 5:21 of the Rules of the Supreme Court of Virginia.

5. Each and every allegation not expressly admitted herein should be treated as denied.

WHEREFORE, respondent prays that the allegations of ineffective assistance of counsel and of improper conduct by the prosecution be considered at a plenary hearing in this Court and that, thereafter, the second amended

petition and all other habeas petitions should be denied and dismissed.

Respectfully submitted,

J.P. MITCHELL
WARDEN
VIRGINIA STATE PENITENTIARY

By /s/ Jerry P. Slonaker
Counsel

Jerry P. Slonaker
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6565

[March 3, 1983]

[SEAL]

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL

April 12, 1983

The Honorable W. R. Wright, Jr., Judge
Circuit Court of Alexandria
520 King Street
Alexandria, Virginia 22314

R: Wilbert Lee Evans v. J. P. Mitchell, Warden, Virginia State Penitentiary (No. 7371)

Dear Judge Wright:

Among petitioner's numerous allegations are claims that the Commonwealth's sentencing exhibits which were presented to the jury, concerning his North Carolina convictions, were misleading, erroneous or otherwise inadmissible. Upon investigation of those records and in the interest of justice, the respondent is constrained to concede that Wilbert Evans' current death sentence cannot be sustained. His capital murder conviction, however, is valid. The Commonwealth's exhibits indicated the following convictions and sentences, as summarized by the Supreme Court of Virginia on direct appeal:

1.	February 21, 1964	—Breaking, entering and larceny	—6 months
2.	July 30, 1964	—Assaulting a police officer with a knife while the officer was in the performance of his duties	—6 months on road
3.	July 30, 1964	—Engaging in an affray with a knife	—6 months on road to run consecutively with other sentence of same date

4.	September 30, 1964	—Engaging in an affray with a deadly weapon	—4 months
5.	December 15, 1970	—Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	—60 days
6.	July 12, 1972	—Escape from North Carolina Prison System	—3 months
7.	September 27, 1972	—Assault with a deadly weapon inflicting serious injuries	—not less than four years nor more than five years

As you know, Evans was sentenced to death *only* on the "future dangerousness" standard and not because of any "vileness" of the killing itself. *Evans* v. *Commonwealth*, 222 Va. 766 (1981). That is, the basis for the death sentence was solely that upon Evans' "past criminal record" the jury found there was "a probability that he would commit criminal acts of violence . . . [and] constitute a continuing threat to society." *Id.* at 776. Despite pretrial efforts by the Commonwealth's Attorney's Office and defense counsel to ascertain his correct record, it has now been determined that most of these North Carolina records—unbeknownst to the prosecution or defense counsel at the trial—were seriously misleading and/or otherwise defective. (See attached affidavit of Russell Nipper, Clerk of North Carolina courts.)

It is well established that a sentence imposed on the basis of assumptions concerning a criminal record which are materially untrue cannot be sustained. *See United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948). Likewise, convictions at which the defendant was not represented by counsel cannot be used against him to enhance his

punishment at a subsequent trial. *See Baldasar* v. *State of Illinois*, 446 U.S. 222 (1980); *United States* v. *Tucker*, *supra; Burgett* v. *State of Texas*, 389 U.S. 109 (1967).

The North Carolina conviction designated herein as #2 was actually vacated by virtue of an appeal for a trial *de novo* in the Superior Court. Then the charge was "nol prossed." Also, the files in North Carolina indicate that Evans was not represented by counsel at those proceedings.

Convictions #3 and #4 were really one case—not two as indicated. The July 30, 1964 (#3) conviction was vacated for a trial *de novo* in the higher court. Conviction #4 (of September 30, 1964) was the result of that trial. Also, Evans had no attorney at either proceeding.

Finally, Evans was without counsel on convictions #5 and #6. Thus, as pointed out by Mr. Nipper, the North Carolina records reflect that Evans had counsel *only* on convictions #1 and #7.

Upon approval of the Court, I will draft a proposed order for Mr. Shapiro's endorsement to vacate the death sentence. Of course, it will be the Commonwealth's decision as to whether or not the Commonwealth should again seek the death penalty at a new sentencing proceeding. I anticipate having the order grant the Commonwealth ninety (90) days to commence such proceedings. Otherwise, a life sentence should be imposed in accordance with § 19.2-264.4A of the Code.

The Governor signed into law (effective March 28, 1983, as "emergency legislation") clarifying procedural amendments to §§ 17-110.1 and 19.2-264.3. These amendments expressly provide for another sentencing hearing *before a new jury* (or judge alone if all concur) in the event a death sentence is set aside or found invalid. A copy of this legislation is enclosed. As you know, the procedure for such a resentencing hearing is set forth in *Fogg* v. *Commonwealth*, 215 Va. 164 (1974); *Huggins*

v. *Commonwealth*, 213 Va. 327 (1972); and *Snider* v. *Cox*, 212 Va. 13 (1971).

Since this was a procedural change, in our judgment the new procedure would be applicable to Evans, if the Commonwealth again seeks the death sentence, and is not "*ex post facto*." *See Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Knapp* v. *Caldwell*, 667 F.2d 1253, 1262-1263 (9th Cir. 1982). *See also Smith* v. *Commonwealth*, 219 Va. 455, 474-476 (1978).

Sincerely,

/s/ Jerry P. Slonaker
JERRY P. SLONAKER
Assistant Attorney General
Criminal Law Enforcement
Division

cc: Jonathan Shapiro, Esquire

The Honorable John Kloch
Commonwealth's Attorney
City of Alexandria

3:5/189
Enclosure

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia

Wednesday, September 21, 1983

The proceedings commenced at 10:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR.

APPEARANCES:

JOHN E. KLOCH, Esq., Commonwealth Attorney; and RICHARD S. MENDELSON, Esq., Assistant Commonwealth Attorney; and RANDOLPH SENGEL, Esq., Assistant Commonwealth Attorney;

JONATHAN SHAPIRO, Esq., 1019 King Street, Alexandria, Virginia 22314; and KENNETH E. LABOWITZ, Esq., 118 North Alfred Street, Alexandria, Virginia 22314, counsel for the defendant.

* * * *

[22] THE COURT: Call your first witness.

MR. SHAPIRO: We call John Kloch and ask for leave to cross-examine.

THE COURT: You may do so.

Whereupon,

JOHN E. KLOCH,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q You're John Kloch?

[23] A Yes.

Q And your title?

A Commonwealth Attorney for the City of Alexandria.

Q You were Commonwealth Attorney at the time Mr. Evans was tried; in fact, prosecuted him, is that correct?

A Along with Randy Sengel, yes, sir.

Q You had been Commonwealth Attorney for some time prior to that?

A Yes, sir.

Q Had you ever handled a death case before?

A No, sir.

Q All right.

And it's true, is it not, that you paid particular attention to this case in light of its seriousness?

A I'd say yes, to all cases.

Q All right.

It's true, is it not, Mr. Kloch, that sometime prior to the trial you asked or directed Mr. Sengel to go to North Carolina, in the company of a police officer, to investigate Mr. Evans' police record?

A That among a lot of things. That was included in what he was there for.

Q And he, in fact, prepared a written report for you, [24] typewritten, concerning Evans' prior conduct; is that correct?

A Yes, he did.

Q All right.

And that report is, in fact, the same one that I attached to my memorandum, is that correct?

A Yes, sir.

Q A five-page typewritten report?

A I don't recall how many pages, but approximately, yes.

Q All right.

And it's your position now that concerning the report that Mr. Sengel was able to obtain that some of them were really judgments of conviction which had been appealed; is that correct?

A You say that's my position now? Maybe I don't understand the question.

Q You understood that in February didn't you?

A In February of when?

Q Let me approach it another way.

A I don't know what you're getting at.

Q You're familiar with Commonwealth's Exhibit 21 as you had it at Mr. Evans' trial?

[25] A Yes, sir. If you're saying that I knew that there were two convictions and they were appealed resulting in one conviction, yes, sir.

Q All right.

Would you review Commonwealth's Exhibit 21, please.

(Exhibit handed to the witness.)

A All right.

Q Mr. Kloch, I'd like you to compare the various documents contained in Exhibit 21 with this chart I have prepared just to make certain that we're dealing with copies of Exhibit 21, aside from the first two pages which are the certification of the clerk in North Carolina.

A On page D there's a part cut off from the original.

Q At the very bottom?

A Yes. It says that notice of appeal bond and dollar —I can't read it, but that appears to be cut off of your exhibit, which is D, engage in an affray with a dangerous weapon, which is one of the ones you're talking about. They appear to be the same pages. Other than they're obviously separated in your case and do not have the certification on that, they appear to be the same pages.

Q And in the same order?

A Yes, sir.

[26] Q All right.

You will notice I have labelled them in the order you reviewed them, A, B, C, D, E, F, and G.

A Yes.

I would say that the exhibit you showed me, which was Commonwealth's Exhibit 21, has been taken apart. I'm assuming that it is in the same order that it was at trial.

Q All right.

Now, just so we're clear, when you received Mr. Sengel's report, you knew that conviction order C, which is for assault on an officer with a deadly weapon, had been appealled and nol-prossed; is that correct?

A Yes, sir.

Q And you knew that conviction order D, which is an affray with a deadly weapon, had been appealled to a higher court?

A Were those convictions that occurred on the same date?

Q That's correct.

A I knew both offenses occurred on the same date and both convictions occurred on the same date, yes, sir.

Q Were you aware what I have labelled E, which is a commitment for engaging in an affray, was actually the [27] result of an appeal from conviction D, engaging in an affray?

A Yes, sir.

Q All right.

So, what appears to be three convictions were, in fact, but one?

A Yes, sir.

Q All right.

THE COURT: What was E, again?

MR. SHAPIRO: E, Your Honor?

THE COURT: Yes.

MR. SHAPIRO: E is a commitment to a state prison for engaging in an affray.

BY MR. SHAPIRO:

Q Did you personally tell Steve Long or Blair Brown of what you knew about these records? And I'm not speaking of what you made available to them in the way of documents. Did you ever tell them, from your mouth, what you knew?

A Yes, sir.

Q Prior to trial?

A I don't think I told them anything about any of the records prior to trial. I mean, we did it through a discovery process.

Q And, in fact, the first time you told them, by your [28] own mouth, was after Mr. Evans had been convicted; is that correct?

A Yes, sir.

Q And that came after a bench conference concerning the admissibility of these documents; is that correct?

A Yes, sir.

Q You remember that bench conference?

A I have a fairly good recollection.

Q And you recall then that Mr. Long made objections to, if not all, as many of these records as he could probably object to and he didn't want them to go to the jury; is that correct?

A I think he only made an objection to pages 2 and 3 of this exhibit.

Q All right.

Do you recall 2 and 3—

A (Interposing) Which is your A and B, I guess.

Q All right.

So, it was your understanding that Mr. Long was complaining about—

THE COURT: (Interposing) Let's get the transcript if need be.

MR. SHAPIRO: The transcript, I intend to produce [29] and examine from it.

BY MR. SHAPIRO:

Q Your understanding was Mr. Long was objecting to A and B, A being an indictment or corresponding document for breaking and entering and larceny, and B being the conviction for a single crime of breaking and entering and larceny; is that correct?

A My recollection was the objection, we couldn't prove that they—because there was no number on B, that it was the conviction for the indictment on A.

Q All right.

You recall that at that bench conference Judge Wright dealt with each of these documents in turn, asking for comments on each?

A He asked—My recollection is he asked the defense whether they had any objection.

Q All right.

Now, this was prior to you telling Mr. Long the problems you first discovered?

A Prior to my telling him from my mouth, that's correct.

Q And you recall Judge Wright going through what I've labelled A, B, C, asking if there were any objections, D, [30] was there any objection, E, any objection. Did you tell Judge Wright about the problems you discovered?

A No. It was not really a problem that I discovered.

Q There's no question pending.

A Okay.

* * * *

[31] Q You had an interest in the progress of the Evans case, no doubt, even after conviction?

A As I do all cases, yes, sir.

Q This had been your only death penalty case, the only case in which you had asked to send someone to the electric chair.

A That's correct.

Q All right.

Did you ask for a copy of Mr. Slonaker's brief?

[32] A No, sir.

Q Did you appear in the Supreme Court of Virginia to hear oral argument?

A No, sir.

Q You do read the opinions of the Supreme Court of Virginia, do you not?

A We get them in huge packs. I give them a cursory review, yes, sir.

Q You are charged with the responsibility of prosecuting criminal offenses in Alexandria?

A That's correct.

Q Is not it important to you, as a lawyer, as a professional, to know what the Supreme Court of Virginia has decided in criminal cases?

A Yes, sir.

Q That's why you order those advance sheets?

A They come automatically, but that's why I read them.

Q And did you read the Evans opinion?

A I'm sure I did.

* * * *

[34] MR. SHAPIRO: Your Honor, I want to move into evidence a copy of the Supreme Court's decision in Evans versus Commonwealth, decided December 4th, 1981. My only copy, unfortunately, is marked, but Mr. Mendelson tells me there is another copy in the *habeas* file.

THE COURT: Any objection to that, Mr. Mendelson?

MR. MENDELSON: No, sir. I believe it's part of the record in this case.

THE COURT: It's already part of the record?

MR. SHAPIRO: It is, indeed.

BY MR. SHAPIRO:

Q Mr. Kloch, I want to show you what purports to be a copy of the Supreme Court decision in Evans versus Commonwealth, and ask you to look at page 709. You remember that document, don't you?

(Document handed to the witness.)

A This document (indicating)?

Q A copy of the Evans opinion.

A I read the Evans opinion, yes, sir.

* * * *

[41] Q Mr. Kloch, I want to ask you several questions about the events occurring after the *habeas* petition was filed. You had conversations with Mr. Slonaker from time to time, didn't you, about the progress of the *habeas* litigation?

A Yes, sir.

Q And you knew, did you not, that Mr. Slonaker had serious problems with what happened in the case concerning those records?

A In terms of the ultimate *habeas*, yes, sir.

Q All right.

And you discussed with him, did you not, your options should Commonwealth actually concede that?

[42] A I'm sure we did at some point during the entire pendency. If we didn't discuss it, I certainly would have been cognizant of it in my own mind.

Q Did you discuss with him the possibility of holding a resentencing?

A Yes, sir.

Q All right.

And, of course, you follow the activities of the legislature, do you not?

A To some extent, yes, sir.

Q Were you aware that S-12 was being considered?

A Yes, sir. I was aware of it, yes, sir.

Q All right.

And you discussed that with Mr. Slonaker, did you not?

A I think to the extent that we were aware it was pending, yes, sir.

Q You said more to each other than just S-12 is pending; you talked about it in reference to the Evans case; is that not true?

A I suspect they were both mentioned in the same conversation, yes, sir.

Q All right.

[43] And you knew, did you not, that if S-12 passed it would make your job, should you decide to try and seek a resentencing of Mr. Evans, a lot easier; is not that right?

A Yes, sir.

There are two theories. In fairness, it would make it easier. More clear I think would be a better word.

Q And you and Mr. Slonaker discussed that?

A Yes, sir, I think in some manner we discussed it.

MR. SHAPIRO: Court's indulgence.

BY MR. SHAPIRO:

Q Two more questions, and they're disjointed ones. One, concerning your conversation with Mr. Long back at the sentencing phase of the trial in which you testified you pointed out to him the problems here, what did he tell you?

A Verbatim?

Q As best you can recall.

A The best I can recall is "leave them in there; we'll argue them to the jury or we'll argue that to the jury or we'll cover it with the jury."

Q And the other question, Mr. Kloch, again concerning your bench conference with Mr. Long, Mr. Brown and Judge Wright, concerning the admissibility of these documents, I ask you, as Judge Wright went through the documents, if you [44] indicated whether there was any problem with them? Did you ever tell the judge what you knew about these three pieces of paper, C, D, and E?

A No, sir.

MR. SHAPIRO: No further questions.

* * * *

[52] BY MR. MENDELSON:

Q Now, at that point Commonwealth's Exhibit 21 was not even entered into evidence in the proceeding at that point?

A At that point, that's correct, because we were arguing over those particular pages, 3 and 4, which were A and B.

Q After resolution of pages A and B of Commonwealth's Exhibit 21, didn't Investigator Lewis Pugh testify?

A That's correct.

Q After he testified, there were several jury instructions that the Court then conferred with counsel and then, before the jury was charged, you and Mr. Sengel spoke to Mr. Long and Mr. Brown; is that correct?

A That's correct.

Q What was the purpose of that conversation?

A As an abundance of caution for lack of a better [53] word. I think, really, Mr. Sengel may have started up the conversation, but I quickly joined in. An abundance of caution to be sure everyone knew what we were dealing with.

Q That's before you introduced Commonwealth's Exhibit 21 into evidence?

A I really can't answer that. I'd have to let the record do that.

Q Let's take a look at the transcript to see when it was that you moved Commonwealth's Exhibit 21 into evidence.

MR. SHAPIRO: Your Honor, we'll stipulate that the documentary evidence was given to the jury at the close of all the evidence on the sentencing phase; in other words, after the conclusion of the Commonwealth's witness.

THE COURT: All right.

BY MR. MENDELSON:

Q Now, in your conversation with Mr. Long and Mr. Brown, when you pointed out the assault on the police officer was nol-prossed and the defendant convicted on the affray with a deadly weapon, what was the reaction of Mr. Brown and Mr. Long?

A Verbally, his reaction was, as you indicated before, that he would argue that to the jury, which I expected. And other than that, there was basically no [54] reaction. They just took it as a matter of course and I took it that that's what they expected to do, and I didn't pursue it any further. There was no surprise or shock or anything of that nature.

Q Now, that conversation you had with counsel, that was not all on the record, was it?

A It was not. It was while the Court was in recess It was after the jury returned their verdict in regard to the sentencing phase.

Q What notation did you make, if any, of what transpired during the trial, especially with reference to things you said to counsel that were not on the record?

A I made two notations: One about this; and one other matter that was not on the record to the effect that Mr. Sengel and I had revealed this information to defense counsel and I put down, to the best of my recollection, what Mr. Long's response was.

Q I'll show you what is to be marked Commonwealth's Exhibit 1 for purposes of this hearing, which is a copy, and ask you, first, can you identify what it is?

(Document handed to the witness.)

A I guess it would be called the prosecution sheet. It's a sheet that goes on the inside, the front sheet of a [55] felony case. It sets forth what the charge is, who counsel is, and any Court action notes.

Q All right.

Mr. Shapiro has indicated to me that he wishes to see the original of that. Do you have that?

A Yes, I have it in my file.

May I, Your Honor?

THE COURT: Sure.

Do you know where it is, Mr. Mendelson?

THE WITNESS: I can find it quicker, Your Honor. It's quite an extensive file.

(Whereupon, the witness temporarily left the witness stand to retrieve the file and, thereafter, resumed the witness stand.)

BY MR. MENDELSON:

Q Using the original of Commonwealth's Exhibit 1, can you tell the Court what your notations read? For the record, what does the notation say?

A "Recess before argument on"—do you want that, or the entire one? There are two notes I wrote.

Q The note that pertains to the issue in question here today.

A At recess before argument on the sentencing part of [56] the trial, I and Randy Sengel pointed out to Steve Long that one of the North Carolina orders of conviction was merely an appeal, two others were assault and battery. Steve said, "Just leave them in there and we'll tell the jury about it," and I put my initial after it.

Q Now, when did you make the notation on your case file?

A I would say sometime very shortly after the conclusion of the jury trial. I don't know whether it was the same day, the day after. I would suggest probably the day after. It was a very exhausting trial and I probably waited until the next day, whenever I got back.

Q Is it not true the jury came back with the sentence and verdict late at night, nine o'clock or something like that?

A It was late in the afternoon.

* * * *

[67] STEFAN C. LONG,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Mr. Long, would you state your name for the record, please?

A Stefan C. Long.

Q And your occupation?

A Attorney-at-law.

[68] Q How long have you been attorney?

A Twenty years August 13th of this year.

Q Prior to going into private practice, what did you do?

A Went to college and law school, and worked for a law firm for seven years.

Q You were an Assistant United States Attorney, were you not?

A After I got through law school, I became an Assistant United States Attorney.

Q And you were an Assistant Commonwealth Attorney.

A An Assistant Commonwealth Attorney.

Q You represented Wilbert Evans at his capital murder trial?

A Yes, I did.

Q Along with Blair Brown?

A Right.

Q To the best of your recollection, Mr. Long, when did you first see the Commonwealth's sentencing exhibits?

A 19, 20 and 21?

Q Yes, sir.

A Right before the luncheon break.

Q On the last day of trial?

[69] A On the last day when we got into the aspect of the penalty.

Q And Exhibits 19, 20, and 21 consisted of various records of conviction or what purported to be records of conviction?

A Commitments, indictments, convictions and the like from North Carolina.

Q Did you have any strategy concerning those records? What did you want to do with them?

A Tried to keep them out, because, quite frankly, the way they were packaged they were confusing, at best. But, in addition to that, there were a large number of things, so we tried to keep them out. And failing that, we tried to minimize the effect they had by indicating they were mostly misdemeanors.

Q If you had an opening to keep out any one of those pages in 19, 20, and 21, would you have taken it?

A Oh, there's no question about that. If I could have kept out the convictions, I would have tried to keep them out.

Q During the sentencing phase or prior to the sentencing phase, did you have any knowledge that the purported conviction for assaulting a police officer with a [70] deadly weapon, which I've labelled C on this chart, and the one next to it, D, which is a purported convic-

tion for an affray with a deadly weapon, were, in fact, not convictions at all?

A No, I didn't.

Q If you had known that, what would you have done?

A We would have objected to them going in, particularly the assault on an officer.

Q And why was that?

A Well, because the whole aspect of the trial was the commission of a killing on a police officer, an officer involved with the law. And, certainly, that, in addition to showing a propensity for violence, also shows a propensity for violence towards a police officer or an officer who is involved with the law.

Q Did anyone ever say to you, Mr. Long, these purported convictions, C and D, really had been appealed and are represented in E?

A Yes, as a matter of fact, they did. I don't remember whom it was, but it was certainly a considerable period of time after the trial, after the appeal to the Virginia Supreme Court, and after the petition for writ of certiorari to the Supreme Court had been denied.

[71] Q That's the first time you learned of it?

A The first time I learned of it was on the writ of *habeas corpus* in this case. It was either you or Mr. Slonaker, with the Attorney General's Office, who told me about it.

Q I'd like to direct your attention to your closing argument in the sentencing phase of the trial. On page 601 of the transcript of April 17, would you take a look at the first paragraph of your closing argument?

(Transcript handed to the witness.)

A I've read that before today and again today.

Q Do you recall what it was you were talking about when you said, "What looks like three convictions, there's only one"?

A I certainly do.

Q What was that?

A Before the arguments were made, Mr. Kloch said to me there is, in effect, one conviction for 21 instead of three, or what appears to be three, and that has to do with breaking and entering and larceny and something of that nature. When he indicated that to me, he indicated he would clear it up with the jury. And I looked again at the transcript and nothing is mentioned in there. When I got up, [72] the first thing I did was mention the fact that he had neglected to clear that up with them.

Q All right.

I want you to look at these records of conviction again that come from Exhibit 21. The first two, A and B, being the breaking and entering and larceny. Are those what you're referring to in that first paragraph?

A That's exactly right.

Q On document A, there appears to be two charges, and document B there is one, and you didn't want the jury to know there were three?

A There was no question that if he had not said anything to me I would not have known anything differently other than the two, what appears to be the two different charges. That's what was talked about.

Q Let me direct your attention to the next page of the transcript, 602.

A I've looked at that before today and today again myself.

Q And when you told the jury, and I'm quoting, "from '63 or '64 there were a number of misdemeanors," were you including the affray wth a deadly weapon, the assault on the police officer, and the other affray, with a deadly [73] weapon?

A What I was talking about, Mr. Shapiro, was whatever was left from 19, 20, and 21. There was no specific reference to either 19 or 20, or what was left in 21; it was just whatever was left.

MR. SHAPIRO: Court's indulgence for a moment.

BY MR. SHAPIRO:

Q You represented Mr. Evans, did you not, in his appeal to the Supreme Court of Virginia, his petition for writ of certiorari to the United States Supreme Court?

A That's correct.

Q I know you're familiar with those documents (indicating).

A I read them again this morning.

Q And in there, the Commonwealth listed, did it not, what turned out to be these invalid convictions?

A It listed not only in the petition for—Well, not petition, but their brief in the Virginia Supreme Court, but in their opposition to our petition for a writ of certiorari or petition for certiorari from the Supreme Court of the United States. And in the same print, the same chronological information was used in the opinion of the Supreme Court of Virginia.

[74] Q If you had known that there was any problem with that recitation of prior convictions, would you have taken any action?

A Well, if I had known that—and I'm assuming what you're referring to is the fact that the assault or the affray with the police officer and the other assault were merged into one on appeal, which indicated a four-month jail sentence. First of all, I don't think I would have, number one, let it go by on the appeal in my brief. Secondly, when I received the brief from the Attorney General's Office, I don't believe I would have not made some comment to it. And, thirdly, if I had known about it before, I don't think I would not have made any comment when I got the opposition to my petition for writ of certiorari.

Q One more question just to be clear. Did Mr. Kloch or Mr. Sengel say to you at trial, or during the sentencing phase, in fact, the assault on a police officer and the affray were really appealed and embodied in this document?

A Mr. Shapiro, I have searched that in my mind and tried to determine, from my own independent recollection, what Mr. Kloch stated to me. And what Mr. Kloch stated to me had reference to the larceny charges. If he had said to me that those assaults, particularly the one on a police [75] officer, were, in effect, only one charge, there is one place we would have gone and that is we would have gone very quickly and cleared it up at the bench. That was never said.

In addition to that, if that was embodied in what he told me, then he either would have said something to the jury and I can assure you if he didn't I would have said something to the jury. And I certainly wouldn't have referred to something as just two items being one.

MR. SHAPIRO: No further questions, Your Honor.

* * * *

[80] BY MR. MENDELSON:

Q Mr. Long, it's true you didn't raise any objection then about that particular issue in regard to the sentencing phase of trial?

A That's correct, Mr. Mendelson. That's right. I had no reason to believe that that was a red herring at that particular time, that the affray, that the assault on the police officer was a red herring. I think I just testified a few minutes ago the first time I found out about that—other than seeing that report and, certainly, if it's there, [81] I guess I have knowledge of it or knowledge is imputed to me. But the first time it really raised a red flag was when Mr. Sloanker or Mr. Shapiro told me it had been nol-prossed.

Q That's because that's the first time it occurred to you it was really significant?

A I wouldn't say that.

Q It was not significant on June 1st, 1981?

A The problem, Mr. Mendelson, whether it was significant to me or not is of no import. It's whether it was significant to the jury. And I think it would have

been significant to the jury. But, of course, I can't tell you what those twelve people knew. If it were me and I knew it had been nol-prossed, in my own mind it would have been significant enough to keep it out.

Q But was it not significant enough on June 1st to raise the point to the court and ask for a rehearing?

A I just got through telling you it didn't raise a red flag to me. It should have, I guess. I should have been more diligent. I should have read everything I got in the discovery, but I didn't, plain and simple.

MR. MENDELSON: Nothing further. Thank you.

* * * *

[83] BLAIR BROWN

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good morning, Mr. Brown. Would you state your name for the record, please?

A Blair Brown.

Q How are you employed?

A Self-employed attorney.

Q For how long have you been practicing law?

A Little over six years.

Q And prior to that?

A I was a Deputy Clerk in the Circuit Court in Alexandria.

Q You defended Mr. Evans along with Stefan Long?

A Yes, sir.

Q And were you present throughout the first trial, including the sentencing phase?

A Yes. There may have been times when I was in the hall doing one thing or another, but it all—the stages [84] when there was anything going on, yes, I was here.

Q All right.

I want to direct your attention to the records of conviction which were contained in Commonwealth's Exhibit 21 of that trial. You're familiar with these, are you not?

(Documents handed to the witness.)

A Yes.

Q Did anyone ever tell you, during the course of these procedings, that this purported conviction for assaulting a police officer had been nol-prossed on appeal?

A No.

Q Or that this purported conviction for an affray with a deadly weapon was, in fact, the same as this additional conviction for assault or an affray with a deadly weapon on appeal?

A No.

Q Had you known that, would you have taken any action?

A I would have vigorously objected to the admissibility of all but those which were, in fact, convictions, that last one.

Q Why was that?

A Because the statute under the sentencing phase clearly says you're only entitled to records of conviction to [85] be entered on the basis on which the Commonwealth is proceeding in the case.

Q Even if the statute allowed things other than convictions, if you knew that those were not, in fact, convictions, would you, in fact, have taken any action?

A That's sort of a non sequitur. It does, so I don't know if I would. I would have objected strenuously under any circumstances I could think of.

Q When did you first find out there was the problem that I described to you with these records of conviction we have been discussing?

A When you told me significantly after the trial.

MR. SHAPIRO: No further questions.

* * * *

[147] JERRY P. SLONAKER,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLOCH:

Q Would you please state your full name and your occupation, and how long you have been employed by the Attorney General's Office.

A Jerry P. Slonaker, Assistant Attorney General. I've been employed as an Assistant Attorney General, Criminal Division, since July of 1975.

Q And you were the Assistant that handled the direct [148] appeal and habeas corpus on the case we are dealing with today?

A That's correct.

Q Mr. Slonaker, I want to go over a couple of things that occurred during the pendency of this case, as well as what your involvement was in Senate Bill 12. You're familiar with Senate Bill 12?

A Yes, I am.

Q Could you give the Court, please, a history in terms of your involvement, if any, in Senate Bill 12?

A Senate Bill 12 was essentially drafted a year before it was introduced. It was drafted by Jim Culp of our office. For reasons unknown to me, it was not introduced or, if it was introduced, it never got out of committee.

Q In the '82 session?

A That's correct.

Subsequently, not too long before the memorandum which I prepared on September 9th, the Deputy Attorney General in charge of the Criminal Division came to me and Jim Culp and indicated to us he was interested in having this bill introduced and he wanted Jim Culp and I to prepare a memorandum explaining the purpose of the bill and outlining the various reasons why it should be introduced.

[149] Q And was that done?

A It was done, that's correct.

Q All right.

And this was proposed as emergency legislation, was it not?

A That's right.

Q For what reason was that?

A Well, it had been a year since—really over a year since the Patterson case had been decided. All of us working in the habeas section felt that this was a problem that needed to be addressed. We were quite aware that in every capital murder case in Virginia there has been a major attack made collaterally with habeas corpuses, especially to the sentencing phase of the trial. This left the situation it allowed as to what an appropriate remedy was. The Patterson case was open to some interpretation, but it appeared to us to be a significant problem. Originally, I felt Patterson mandated a life sentence back when I wrote the memorandum along with Jim Culp on September 9th. Consequently, our office reviewed the Patterson decision further and came to the conclusion that Patterson did not foreclose bringing back the original jury; that might or might not be a viable remedy in a given case, but our office [150] takes that position and has maintained it.

Q You, more or less, switched your position from a mandated life sentence to argue there was an opportunity to bring back the same jury?

A That's right.

Q It did foreclose bringing back a new jury?

A That's correct. That's right.

Q All right.

Now, incidentally, that memorandum, did that have any reference whatsoever to the Evans case?

A Absolutely not.

Q How about after that, Mr. Slonaker, what involvement did you have in Senate Bill 12?

A I took the bill that Jim Culp had drafted, sat down with him. I think we made a few polishing changes to it, but it was essentially as he had drafted.

Q In 1981?

A '81.

I then worked with him to prepare the memorandum fro Don Geering, as per his request, to lay out why we felt legislation was needed and why it was needed as emergency legislation.

Q September 9th, 1982?

[151] A That's correct, right.

Q Okay.

Afte. that particular memorandum, did you have any other input in Senate Bill 12?

A Yes, I did. Mr. Geering, as Deputy in charge of the Criminal Division, has primary responsibility on all legislation drafted by this division. He does, however, on all bills have some backup people, because occasionally he's required to be out of town and unavailable. So, he asked Jim Culp and I to be the backup for that bill.

Now, I had some further involvement if you want me to go into that.

Q All right.

A The bill was called before the Senate Court of Justice Committee. I think that was on January 19th. Jim Culp was going to testify before the Senate committee. He asked that I accompany him to the Senate committee so that I could—we could put our heads together if any question came up. He was to do the testimony. He did that. Subsequently, I was advised by the House to appear to testify. I did appear one date. The bill was not called. I had to go out of town and Jim Culp appeared, but I don't think he testified. I think the bill passed without any testimony [152] being given in the House.

Q As it turned out, you never testified in reference to that?

A That's correct.

Q Do you know when the bill ultimately passed the General Assembly?

A Yes, I do, 12:44 p.m. on February 22nd.

* * * *

[166] Q At the time error was conceded in the Evans case, this was the first time that had occurred, is that a fair statement, that your office had conceded error in a habeas case?

A To my knowledge, yes.

Q This was emergency legislation?

A That's correct.

Q It became effective March 28th?

A That's correct. Emergency legislation becomes effective upon signature by the Governor.

Q As opposed to July 1st?

A That's right.

Q If this had not been emergency—

A (Interposing) It would have just routinely become effective the 1st of July.

Q Can you tell me what the emergency was?

A The emergency was that we had death penalty challenges in numerous capital cases and, while I personally felt that once a statute was enacted I think it would cover any case, but the point is there was, without question, [167] serious problem. The emergency was that why are you going to proceed in continuing a situation that has not been addressed by appropriate legislation where, as Justice Thompson said in his dissenting opinion in Patterson, there is a serious defect or flaw in the law under the Patterson interpretation.

Q Were there any other cases, to your knowledge, in your office then being considered for the kind of confession of error that was made in the Evans case?

A In the cases where they had raised some substantial issues, I'm not aware of whether or not the attorneys handling those cases had given serious consideration to the confession of error; they may have, they may not have, I'm not aware.

Q Is it a fair statement that between March 28th and July 1st, 1983, no further confession of error and, to my knowledge, no vacations of the death penalty were made by any court in Virginia?

A Not to my knowledge.

Q In the discussions that you had—Strike that.

When did you first become aware the prosecutor's office, Commonwealth Attorney's Office in Alexandria had been aware prior to trial of the C, D, E problem?

[168] A The awareness was just what John Kloch testified to here today.

Q When you're saying awareness, it's kind of a loaded question. I mean your awareness.

A The way you asked the question, what I'm trying to say is I contacted John Kloch after the petition was filed.

Q Okay, let me make it simple then. Prior to the petition being filed, you had no knowledge of the C, D, E problem?

A I did not.

Q And I take it you had no knowledge of the uncounselled misdemeanor convictions as well?

A I did not.

Q And then the petition is filed and then, I take it, from there the second *habeas* petition was filed?

A The petition was filed and I recall sending a copy of the petition to Mr. Brown, Mr. Long, and I think Mr. Kloch if he didn't already have a copy. I know I provided copies of all petitions, as they were filed, to Mr. Long, Mr. Brown, and Mr. Kloch.

Q And at that point something happened?

A I don't know the exact dates when I talked to John [Kloch]. I know I spoke to him on the telephone on a number of [169] occasions. I met with him at his office on one or two occasions. I just don't recall the precice date.

Q And when was it you first became aware of the Commonwealth Attorney's Office, the collective knowledge

of the C, D, E error prior to—Let me rephrase all of that.

When did you become aware that Mr. Kloch and Mr. Sengel had been in possession of the C, D, E problem, knowledge of the C, D, E problem? As we've heard today, they said they told Mr. Long and Mr. Brown about that. When did you first become aware that Mr. Kloch and Mr. Sengel had that information at the time they said they had it?

A I'm not sure. I just don't recall.

Q Sometime prior to today?

A Certainly.

Q Sometime prior to January 1983?

A I would think so.

Q But not prior to the filing of the petition?

A No.

Q The second petition?

A No.

Q Did you discuss this case with them when you drafted the death appeal brief?

A No.

[170] Q Is that customary?

A No, it's not.

Q It's not customary and you didn't talk to him?

A It's not customary to talk to Commonwealth Attorneys. I'm limited by the record that's been prepared by the Circuit Court. I can't go outside the record.

Q I appreciate that. I'm trying to nail that down.

A If he may help me to understand something in the record, I might contact him. Sometimes we write to the Comonwealth Attorneys and say, "A petition for writ of error has been granted in this case. I'll listen to any comments you have." I don't recall that in this case.

Q You didn't review your records on this case?

A I just recalled that. I didn't review the records, no.

Q Did Mr. Kloch or Mr. Sengel confirm to you the understanding obtained from the second and third *habeas* petitions?

A John Kloch indicated to me what he has related from the witness stand today, yes.

Q And you, thus, had the evidence presented, the paperwork itself, you had all the other sentencing memoranda and everything else, you had the letters from Mr. [171] Nipper, and all this by January '83; is that correct?

A I had some of it. I did not have information relating to the counsellees conviction claims.

Q But as far as the C, D, E problem—

A (Interposing) I had the records that had been forwarded. That's in the *habeas* file.

* * * *

[187] THE COURT: Anything further, Mr. Labowitz?

MR. LABOWITZ: No, sir.

THE COURT: The evidence fails to demonstrate the [188] defendant's constitutional rights were violated by the Commonwealth's purposeful and wrongful delay of his *habeas* petition for tactical advantage as claimed by the defendant. Ground 2 of the defendant's objection to re-sentencing will be overruled.

MR. KLOCH: Your Honor, I take it that implies that the Court's finding is there was no purposeful delay, for the record?

THE COURT: That's correct.

MR. KLOCH: Thank you, Your Honor.

THE COURT: All right.

Ready to proceed with ground 3?

MR. SHAPIRO: Yes.

* * * *

ORDER

THIS MATTER came on to be heard on the 21st day of September, 1983 upon the motion of the defendant, by counsel, to bar the Commonwealth from seeking the death penalty in the above styled matter at any subsequent sentencing hearing upon the grounds alleged by the defendant in his written motion filed heretofore, namely that the Commonwealth's handling of the above styled matter constituted prosecutorial misconduct, that the Commonwealth purposefully delayed an admission of error in regards to the defendant's petition for a writ of habeas corpus in order to permit the Commonwealth to seek the death penalty pursuant to § 19.2-264.3 Code of Virginia (1950), as amended, that subjecting the defendant to a sentencing hearing before another jury after part of the evidence submitted during the first sentencing hearing has been declared inadmissible constitutes double jeopardy in violation of the defendant's Constitutional rights, that pretrial publicity has allegedly occurred so as to preclude a fair hearing, and that the amendment to § 19.2-264.3 Code of Virginia when applied to the above styled matter violates the Constitutional prohibition against *ex post facto* laws;

WHEREUPON the defendant appeared in open court, in the custody of the Sheriff, together with his attorneys, Jonathan Shapiro and Kenneth Labowitz, also came John E. Kloch, Commonwealth's Attorney, Richard S. Mendelson, Deputy Commonwealth's Attorney, S. Randolph Sengel, Assistant Commonwealth's Attorney, and Jerry Slonaker, Assistant Attorney General; and

AFTER RECEIVING EVIDENCE AND HEARING ARGUMENT of counsel, the Court is of the opinion and finds that the defendant has failed to prove by a preponderance of the evidence that the prosecution engaged in such misconduct or tactics of a nature which should preclude the Commonwealth from again seeking the death penalty in this case; and the Court does

FURTHER FIND that the evidence fails to prove by a preponderance of the evidence that the Commonwealth purposefully and wrongfully delayed resolution of the defendant's petition for a writ of habeas corpus in order to achieve a tactical advantage as alleged by the defendant; and the Court is of the

FURTHER OPINION that the amendment to § 19.2-264.3 Virginia Code enacted by the 1983 session of the General Assembly and sometimes referred to in this proceeding as Senate Bill 12 does not violate the Constitutional prohibition against *ex post facto* law as applied to the facts of this case; and the Court is of the

FURTHER OPINION that the defendant's motion as hereinabove stated in regard to the allegation pertaining to pre-trial publicity be denied without prejudice to the right of the defendant to renew, if it becomes apparent during voir dire of the veniremen that pre-trial publicity has rendered obtainment of a fair and impartial jury impossible; and the Court is of the

FURTHER OPINION that the subjection of the defendant to another sentencing hearing does not constitute a violation of the Constitutional prohibition against double jeopardy; it is therefore

ORDERED that the said motion to bar the Commonwealth from seeking the death penalty in this case be and the same hereby is DENIED; it is

FURTHER ORDERED that this case be CONTINUED to Thursday, October 20, 1983 at 10:00 a.m., by agreement of counsel, for selection of a sentencing hearing date; and it is

FURTHER ORDERED, with the concurrence of defense counsel, that the defendant be remanded to the custody of the Virginia Department of Corrections pending sentencing before this Court.

THE COURT CERTIFIES that the defendant was present during the hearing before the Court referred to herein, and that he was competently represented by his counsel.

ENTERED this 12th day of October, 1983.

/s/ Wiley R. Wright, Jr.
WILEY R. WRIGHT, JR., JUDGE

SEEN AND AGREED:

/s/ Richard S. Mendelson
RICHARD S. MENDELSON
Deputy Commonwealth's Attorney

SEEN AND OBJECTED TO:

/s/ Jonathan Shapiro
JONATHAN SHAPIRO, ESQ.
Counsel for Defendant
1019 King Street
P.O. Box 383
Alexandria, Virginia 22314

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

F-5105

COMMONWEALTH OF VIRGINIA,

vs.

WILBERT LEE EVANS,
Defendant.

Alexandria, Virginia
Friday, February 3, 1984

The trial commenced at 9:30 o'clock a.m.

BEFORE:

THE HONORABLE WILEY R. WRIGHT, JR., and a jury.

APPEARANCES:

JOHN KLOCH, Esq., Commonwealth Attorney and RICHARD S. MENDELSON, Esq., Assistant Commonwealth Attorney.

BLAIR D. HOWARD, Esq., and GARY R. MYERS, Esq., Howard and Howard, 128 North Pitt Street, Street, Alexandria, Virginia, 22314, counsel for the defendant.

• • • •

[61] THE COURT: The Court will recess to await the verdict of the jury.

(Whereupon, a recess was taken.)

(1:05 p.m.)

THE COURT: Gentlemen, I have received a question from the jury and I wanted to give you a chance to express your thoughts as to how I should respond before I brought the jury back in to answer the question. The question reads as follows, "The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?"

* * * *

[65] MR. HOWARD: Your Honor, I would respectfully say this, I'd just like to know on the record, I think they should be told what the Statute says, and that is, if they cannot be unanimous on death, then it is life.

THE COURT: I will tell you what the flaw in that is, Mr. Howard, that encourages a single person to hold out, and tells a single person that they have the ability to dictate the outcome.

MR. HOWARD: Of course everything, respectively, sir, that we have given them in the Instructions is modeled after this Code Section and I am simply requesting that which the Code Section provides.

THE COURT: I understand why you are doing it, but I am going to tell them that their verdict must be unanimous as to either life imprisonment or the death penalty.

MR. HOWARD: Yes, sir. Just respectively note my exception.

THE COURT: Certainly. Bring the jury in. If they are not satisfied with that response, then we will see where we go from there.

[66] MR. HOWARD: Yes, sir.

(Whereupon, the jury returned to the jury box.)

THE COURT: Ladies and gentlemen, I have your question which reads as follows, "The decision must be unanimous for death. Must the decision also be unanimous for life, or does a spit decision automatically become life?"

You are instructed that your verdict must be unanimous as to either life imprisonment or death.

You may resume your deliberations.

* * * *

THE RICHMOND NEWS LEADER

Monday, June 4, 1984

GUARDS, WHO FEARED FOR LIVES, RESENT CRITICISM

SOUTH HILL—"They picked me up by my arms and legs. I thought they were going to bash my brains out against the wall and I started to pray, 'Lord have mercy . . .'

"Instead they crammed my body between the death row cells amongst the plumbing fixtures. They shut the chase door and I could only hear what was coming down."

Those were the recollections of one of the 14 employees of the Mecklenburg Correctional Center who were taken hostage Thursday night during an escape by six death row inmates.

Two of the escapees have been recaptured—but four, including convicted murderers James D. and Linwood E. Briley of Richmond, remained at large today.

The correctional center employee and two other guards agreed to an interview with The Richmond News Leader if their identities were kept secret.

The men said they had been cautioned against talking to reporters and were afraid they would lose their jobs if they were identified. The three fear their jobs are in jeopardy anyway.

But they said all of the hostages are angry about statements that have been made about them by state corrections officials.

Recalling events during the 90 minutes that 14 employees were held hostage, a guard said the escaping inmates "shut me behind the door after holding a knife to

my throat and other parts of my body. They threatened to kill me . . .

"The higher-ups can say all they want to about this, but it isn't the guards' fault," he said. "The fault should go to the ones in charge of the institution. We just work here and we don't have enough help. It would be different if it had been their throat."

All employees taken hostage during the escape have been placed on paid leave during the investigation. The guards said 12 male correctional officers and two female nurses were taken hostage. Most were bound and blindfolded and put in different places within the prison facility. They were bound with bandages, torn sheets and ropes.

The guard said someone would have been harmed if two death row inmates who did not escape with the others had not intervened. There were 23 inmates on death row Thursday night. A 24th inmate reportedly was away for a court hearing.

The guard said inmates Wilbert Lee Evans and Willie Llyod Turner repeatedly cautioned the escaping inmates that they had promised there would be no bloodshed. Evans and Turner reportedly also were responsible for the nurses not being badly mistreated.

"Evans and Turner kept yelling down to where they (the escaping inmates) had the nurses, saying, 'Ma'am, are you all right? Nurse . . . are you all right?' They pleaded with the escapees to leave them alone."

The guard said, "If I am ever allowed to go back on death row, I intend to thank those men. It was the funniest thing I have ever seen in a way. What I mean is, I don't understand why all of them didn't run.

"I do know I owe my life, as do all the others, to Evans and Turner. If I had the money, I would hire an

attorney for them and see if they couldn't be set free. Maybe they have been changed. They (the escaping inmates) would have killed every damn one of us. After this, I know there's a God and he loves me." [Emphasis supplied.]

* * * *

THE WASHINGTON POST B8

Wednesday, July 4, 1984

NURSE HELD HOSTAGE DURING ESCAPE SAYS SHE FEELS LUCKY—AND AFRAID

CLARKSVILLE, Va., July 3 (AP)—A prison nurse who was sexually molested during the escape of six death row inmates from the Mecklenburg Correctional Center said she had thought about quitting her job many times before the May 31 breakout because she didn't feel safe.

"I worked about a year before the security began to decrease," said Ethel Barksdale, who was hired at the maximum security prison near Boydton, Va., in December 1981.

"We started to have less protection . . . About six or eight months after I went to work there, an inmate tried to stab me with a fountain pen, but he missed," Barksdale told the Richmond News Leader in a copyright story. "There was another incident where I was slapped in the face by an inmate.

"The job was getting too stressful for me. "I had thought many times about leaving, but . . . I have to support myself." She is on leave, while deciding whether to return to her job.

Sitting in her one-bedroom mobile home Sunday, dressed in a sundress and clutching a tiny stuffed koala bear, the 26-year-old woman spoke quietly about the two-hour ordeal she says "changed my life altogether."

"I don't feel like a whole person," she said. "I am really afraid of men now—any man . . . I have kept it all inside of me, and I haven't cried very much. I had nightmares about it at first, but the medication helped.

"I have just started staying alone again for the last two weeks. At night, I still wake up, and if I hear a dog or something, I'm so afraid that there will be someone lurking."

Barksdale was one of 14 prison employees taken hostage in the largest death row escape in U.S. history.

She said she was making her rounds dispensing medicine to the inmates when she walked into death row, where the inmates were already holding several guards captive.

"I could see the officers lined up on the floor face down and tied up," she said. "I started thinking about my mother and my family. I was just crying and praying. They told me to be quiet because they didn't want anybody to hear me."

Earl Clanton, one of the escapees, ordered her to strip. Barksdale said she took off all her clothes except her underwear.

"He came back and said, 'Miss, did you hear me? I said you have 20 seconds to take all your clothes off,' " she said, "I was so scared and humiliated."

She said she got help from inmate Wilbert Lee Evans, a death row convict who did not escape and whom prison officials have credited with saving the lives of the hostages.

"*Evans asked [Clanton] to give me a blanket to cover myself with and he did,*" *Barksdale said.* "But as soon as Evans left the cell, Clanton tied my hands and feet and made me lie down on the bed. I was begging him to leave me alone, but he started to molest me with his hands."

Clanton left and Linwood Briley came in. Both men touched her several times, but Barksdale said she wasn't raped. "I think that the only thing that saved me was time."

"They kept rushing around trying to get out. *Evans kept asking me if I was all right,* and [inmate Willie Lloyd] Turner untied me and let me go after it was over."

More than a month after the ordeal, Barksdale said she is still confused and emotionally battered—but she is also alive. "I thought that night that I'd never set my feet on ground again. Somehow, some way I have made it through. I am so lucky." [Emphasis supplied.]

No. 89-516

In The

Supreme Court of the United States

October Term, 1989

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the courts below correctly determined that resentencing petitioner to death pursuant to a procedural statute, which became effective after petitioner's first sentencing proceeding but before his original death sentence was set aside, violated neither the *ex post facto* nor equal protection clauses of the Constitution.

II. Whether the courts below, in rejecting petitioner's claim of prosecutorial misconduct, correctly applied 28 U.S.C. § 2254(d) to the state courts' findings that the Commonwealth had acted in good faith.

III. Whether the courts below correctly determined that petitioner was not entitled to federal habeas relief on the basis of a claim that he was denied the effective assistance of counsel during the direct appeal of his original death sentence which was vacated more than six years ago.

IV. Whether the courts below correctly rejected petitioner's claim that due process required the trial court to instruct the jury that if it could not agree upon the issue of punishment the court would automatically impose a life sentence.

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No. 89-516

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari

at SA-1 and 2, and in the appendix to this brief in opposition at 1a-2a.[1]

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria, Virginia, convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury's verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (*Evans I*). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April, 1982. He amended his habeas petition on two occasions, the second in late December, 1982. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983, and on May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

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[1] References to the Petition for Writ of Certiorari will hereafter be designated "(Ptn. ___)." References to the petitioner's appendix will be designated "(App. ___)." And references to the appendix to this brief in opposition will be designated "(A. ___)."

On January 30, 1984, the Circuit Court impaneled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury's verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (*Evans II*). This Court again denied certiorari. 471 U.S. 1025 (1985).

On May 14, 1985, Evans reinitiated state habeas corpus proceedings. An evidentiary hearing was conducted in the Circuit Court of the City of Alexandria on December 16, 1985, and Evans' habeas petition was dismissed in its entirety by an order dated June 3, 1986. Evans' petition for appeal to the Virginia Supreme Court was refused in an order dated February 26, 1987. This Court denied certiorari a third time on June 22, 1987. 483 U.S. 1010 (1987).

Evans filed his federal habeas petition in the United States District Court for the Eastern District of Virginia on October 5, 1987. On November 17, 1987, he filed a motion under Rule 6, Rules Governing § 2254 Cases, requesting discovery of the Commonwealth's files. In that motion, Evans alleged that the files contained evidence which would support his claim of prosecutorial misconduct. The Commonwealth opposed the motion, but agreed to an *in camera* review of the files by the District Court. On April 12, 1988, after conducting such a review and finding no support whatsoever for Evans' allegation, Judge Robert R. Merhige, Jr. denied the discovery motion. On August 4, 1988, in a lengthy written opinion, Judge Merhige carefully considered and rejected each of Evans' claims. (App. 17a-28a).

The United States Court of Appeals for the Fourth Circuit unanimously affirmed Judge Merhige's decision on August 2, 1989. *Evans v. Thompson*, 881 F.2d 117 (4th

Cir. 1989). (App. 2a-16a). Evans petitioned for a rehearing en banc, but not a single judge on the entire Fourth Circuit voted to rehear the case. (App. 1a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 3a).

The evidence at his resentencing hearing revealed that Evans had a significant prior history of violent criminal conduct. The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness."[2] *See* Va. Code § 19.2-264.2. (Ptn. at SA-1).

REASONS FOR DENYING THE WRIT

Preliminary Statement

All of the claims which Evans has raised in his present petition have previously been presented to this Court. In 1985, after the Virginia Supreme Court had affirmed his resentencing on direct appeal, Evans brought his *ex post facto*, equal protection, and due process claims

[2] Evans' reference to events outside the record which allegedly occurred after his resentencing trial (Ptn. 9 n.7, 29 n.40) are not only improper but are manifestly irrelevant to the issues raised in his petition.

to this Court. (See Questions Presented Nos. 1-3 in *Evans v. Commonwealth*, No. 84-1224). In that same proceeding, in the context of his equal protection claim, Evans also raised his allegation of prosecutorial misconduct. (See Evans' petition in No. 84-1224 at 6, 16-20). Evans' attempt to persuade this Court to review his claims was unsuccessful. And in 1987, after the conclusion of his state habeas proceedings, Evans failed in his effort to have this Court review his claim that he was denied the effective assistance of counsel during the direct appeal of his original death sentence. (See Question Presented No. 1 in *Evans v. Commonwealth*, No. 86-1754).

In the aftermath of Evans' prior petitions, the very same claims which he raised then have been exhaustively litigated and meticulously reviewed by the courts below. The District Court Judge in this case, the Honorable Robert R. Merhige, Jr., rejected all of Evans' claims and his opinion contains not even a hint of constitutional error in petitioner's case.[3] (App. 17a-28a). In a similar manner, the Fourth Circuit carefully analyzed and unanimously rejected Evans' claims. (App. 2a-16a). Moreover, when Evans petitioned for rehearing, not a single member of the Fourth Circuit voted to rehear the case. (App. 1a). Under these circumstances, there is even less reason now for this Court to grant certiorari review than there was when the Court denied Evans' prior petitions.

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[3] Judge Merhige is a jurist whose special concern for petitioners facing death sentences cannot be doubted. Indeed, it was Judge Merhige who fashioned the "right to counsel" during state habeas proceedings for Virginia death row inmates which was the subject of controversy in *Murray v. Giarratano*, ___ U.S. ___, 109 S.Ct. 2765 (1989). It was no doubt because of Judge Merhige's reputation that Evans filed his federal habeas petition in Richmond, where Judge Merhige presides, rather than in Alexandria where the petition normally would have been filed.

I. THE COURTS BELOW CORRECTLY REJECTED EVANS' *EX POST FACTO* AND EQUAL PROTECTION CLAIMS.

A. No *ex post facto* violation

At the time of petitioner's offense, and at the time of his first sentencing proceeding, Virginia Code § 19.2-264.3 provided that in a capital murder jury trial the sentencing proceeding must be conducted before the same jury which determined the defendant's guilt. The Supreme Court of Virginia announced such an interpretation of § 19.2-264.3 in *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). At the time Evans' original death sentence was vacated, however, and at the time of his resentencing proceeding, § 19.2-264.3 had been amended to provide that if a death sentence were "set aside or found invalid," a resentencing proceeding could be held before "a different jury" than the one which had determined the defendant's guilt. Petitioner contends that the application of the amended version of § 19.2-264.3 to his case constitutes an *ex post facto* violation.

In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court held:

> Critical to relief under the *Ex Post Facto* Clause *is not an individual's right to less punishment*, but the lack of fair notice and governmental restraint when the legislature increases punishment *beyond what was prescribed when the crime was committed.*

450 U.S. at 30 (emphasis added). And in *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court recognized that the proper focus of an *ex post facto* analysis is "the quantum of punishment attached to the crime" at the time of the offense. 432 U.S. at 294. The Court also made it quite clear that if the change in a particular law is either "procedural" or "ameliorative" there can be no *ex post facto*

violation. 432 U.S. at 292, n.6, *citing Beazell v. Ohio*, 269 U.S. 167 (1925).

In *Miller v. Florida*, 482 U.S. 423 (1987), this Court concluded that "even if a law operates to a defendant's detriment, the *ex post facto* prohibition does not restrict 'legislative control of remedies and modes of procedure which do not affect matters of substance.' " 482 U.S. at 433, *quoting Dobbert* 432 U.S. at 293. Under *Miller*, "no *ex post facto* violation occurs if the change in the law is merely procedural and does not 'increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 482 U.S. at 433, *quoting Hopt v. Utah*, 110 U.S. 574, 590 (1884). The Fourth Circuit and the District Court meticulously analyzed Evans' claim under this Court's precedents and correctly concluded that the claim must fail. (App. 5a-8a, 20a-22a).

As the Virginia Supreme Court found in *Evans II*, petitioner "had notice at the time of the offense" as to "the quantum of punishment attached to the crime," and the change in § 19.2-264.3 was merely an "adjustment in the method of administering that punishment that [was] collateral to the punishment itself." 228 Va. at 476-477, 323 S.E.2d at 119. The Fourth Circuit and the District Court reached the same conclusion. (App. 6a, 21a). In no sense can it be reasonably said that the amendment of § 19.2-264.3 increased the punishment attached to Evans' offense "beyond what was prescribed when the crime was consummated." *See Miller*, 482 U.S. at 430, *quoting Weaver*, 450 U.S. at 30.

With respect to whether the change in the law at issue here was "procedural," this case cannot be distinguished from *Dobbert v. Florida* in any meaningful way. In *Dobbert* a defendant, who had been sentenced to death by the trial judge despite the jury's recommendation of a life sentence, argued that a change in Florida law had

deprived him of a "substantial right to have the jury determine, without review by the trial judge, whether the death penalty should be imposed." 432 U.S. at 292. This Court rejected that argument and ruled that such a "change in the role of the judge and jury in the imposition of a death sentence" was merely procedural, and therefore applying the new law to *Dobbert* did not constitute an *ex post facto* violation. *Id.*

As in *Dobbert*, the change in the law in Evans' case was merely procedural in that its only effect was to alter the procedures surrounding the imposition of the death penalty and did not increase the quantum of punishment attached to Evans' crime. At the time of his offense, Evans had no more of a "substantial right" to a life sentence if or when his death sentence was ever set aside, or to a sentencing by the same jury which had convicted him, than *Dobbert* had a "substantial right" to have a jury impose sentence without the intervention of a trial judge. In both cases, " 'the crime for which the . . . defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.' " *Miller*, 482 U.S. at 435, *quoting Dobbert* 432 U.S. at 294.[4]

The courts below also correctly concluded that Evans' reliance upon *Kring v. Missouri*, 107 U.S. 221

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[4] Since the change in Virginia law was clearly "procedural," no *ex post facto* violation could be found even if the change had not been "ameliorative." *See Dobbert* 432 U.S. at 292, n.6. The Fourth Circuit, however, agreed with the Virginia Supreme Court that the change was also ameliorative because its purpose was to protect a defendant's right "to a fair and impartial determination of his punishment" by a jury "free of any taint arising from errors during the first trial." (App. 8a, *quoting Evans II*, 228 Va. at 477, 323 S.E.2d at 119).

(1883), is misplaced. (App. 7a, 21a-22a). At the time of the offense in *Kring*, the rule in Missouri was that if a person were convicted of second-degree murder, he was thereby forever acquitted of first-degree murder. 107 U.S. at 223. Prior to Kring's trial, the Missouri Constitution was amended so that if the conviction of a person who had pleaded guilty to second-degree murder were reversed, that person could be convicted of first-degree murder upon retrial. 107 U.S. at 224. Upon a plea of guilty, Kring was convicted of second-degree murder and was sentenced to twenty-five years in prison. He appealed, however, on the basis of a breached plea agreement and his conviction was reversed. Upon retrial, Kring was convicted of first-degree murder and sentenced to death. 107 U.S. at 221. This Court ruled in *Kring* that applying the new law to the defendant rather than the law in effect at the time of his offense violated the *ex post facto* clause. 107 U.S. at 235-236.

Evans' case, however, is readily distinguishable from *Kring*.[5] The Court's primary concern in *Kring* was articulated as follows:

> The case rests then upon the proposition that, having an erroneous sentence rendered against him . . . by the court, [Kring] could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death *for another and different offense of which he stood acquitted* by the judgment of that court.

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[5] When Evans brought his *ex post facto* claim to this Court in 1985, he implicitly acknowledged that *Kring* is inapposite. A review of his 1985 petition and reply brief (No. 84-1224) reveals that *Kring* was not even cited as authority for his claim even though he had relied upon *Kring* in the Virginia Supreme Court on direct appeal. *See Evans II*, 228 Va. at 477, 323 S.E.2d at 119.

107 U.S. at 235 (emphasis added). Unlike the defendant in *Kring*, Evans has never been convicted of a lesser offense for which the death penalty is not an authorized punishment, nor has he ever been acquitted of any offense for which the death penalty is authorized. And unlike the situation in *Kring*, Evans "hazarded" nothing in terms of a greater offense or punishment by seeking to overturn his original death sentence.

In *Hopt v. Utah*, this Court explained *Kring* in the following manner:

> By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

Hopt, 110 U.S. at 589. Thus, as the Fourth Circuit found (App. 7a), *Kring* stands for the rather unremarkable proposition that if, at the time of the offense, a defendant is on notice that if he commits a certain offense (second-degree murder) he can *never* be subjected to a death sentence, imposition of a death sentence after conviction for that offense violates the *ex post facto* clause. Evans, however, has always been on notice that death was a permissible punishment for his offense. *See* Va. Code §§ 18.2-31(f) and 18.2-10(a). (A. 1a).

The Virginia Supreme Court, the District Court, and the Fourth Circuit have all analyzed Evans' claim under the proper standard and all have concluded that there has been no *ex post facto* violation. The petitioner has failed to show any circumstances which would warrant the granting of certiorari.[6]

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[6] Evans' attempt to show a "conflict" among the federal circuits has no basis in fact. (Ptn. 10 n.9). In *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989) (en banc), the Ninth Circuit expressly stated, "Because we decide this case on due process grounds, rather than under the *ex post facto* clause as in *Dobbert*, we do not reach Coleman's *ex post facto* argument." 874 F.2d at 1286 n.7. Thus, *Coleman v. McCormick* certainly cannot form the basis for an argument that there is a split among the circuits concerning the proper application of *Dobbert*. To the contrary, the Fourth Circuit's decision in Evans' case is consistent with the decisions of every other circuit which has applied *Dobbert* to similar *ex post facto* claims. *See Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989) (rejecting *ex post facto* claim where under old law petitioner's death sentence would have automatically been reduced to life sentence if jury found erroneous mitigating circumstance). *See also Jordan v. Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *Knapp v. Cardwell*, 667 F.2d 1253, 1262-1263 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982) (rejecting *ex post facto* claim where petitioner claimed right to life sentence under state law). Evans' reliance upon several state cases (Ptn. 11 n.9) is equally unsuccessful. *Thigpen v. Thigpen*, 541 So.2d 465 (Ala. 1989), does not purport to decide a federal *ex post facto* claim, but rather, expressly states that resentencing Thigpen "would indisputably violate § 7" of the Alabama Constitution. 541 So.2d at 467. Similarly, the express basis for the decision in *State v. Rodgers*, 242 S.E.2d 215 (S.C. 1978), was *not* the *ex post facto* clause, but rather, the court's conclusion that the state legislature had not intended the new statute to be applied to defendants who were tried before the statute's effective date. 242 S.E.2d at 218. *Meller v. State*, 581 P.2d 3 (Nev. 1978), does not even mention the *ex post facto* clause,

(Continued on following page)

B. No equal protection violation

The essence of Evans' equal protection claim is his allegation that he and the defendant in *Patterson v. Commonwealth* were "similarly situated," and yet, the Virginia Supreme Court applied the original version of § 19.2-264.3 to Patterson's case and commuted his death sentence to a life sentence, while the Court applied the amended version of the statute to Evans' case and affirmed the reimposition of his death sentence.[7] The courts below, however, carefully analyzed the claim and rejected it for the same reason it had been rejected on direct appeal by the Supreme Court of Virginia: the classification at issue in this case is rationally related to the purpose of the statutory amendment.

In *Evans II*, the Virginia Supreme Court found that the purpose of the amendment to § 19.2-264.3 was merely

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(Continued from previous page)

and Evans concedes that the lower appellate court ruling in *State v. Creekpaum*, 732 P.2d 557 (Alaska App. 1987), has been overruled by the Alaska Supreme Court. 753 P.2d 1139 (1988). Thus, none of the state cases Evans has cited can support his "conflict" argument. To the contrary, all of the state courts which have decided a federal *ex post facto* issue similar to Evans', have, like the Virginia Supreme Court, applied *Dobbert* and found no violation. *See, e.g., Cartwright v. State*, 778 P.2d 479 (Okla. Crim. App. 1989), *overruling Dutton v. Dixon*, 757 P.2d 376 (Okla. Cr. App. 1988); *Klasing v. State*, 771 S.W.2d 684, 686-687 (Tex. App. 1989); *Pickens v. State*, 730 S.W.2d 230, 234-235 (Ark. 1987); *State v. Norton*, 675 P.2d 577, 585-588 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984).

[7] To the extent Evans is merely alleging that state law, *i.e.* the *Patterson* decision, was misapplied in his case, such a claim is clearly insufficient to constitute a denial of equal protection. *See generally Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (mere error of state law not basis for federal habeas relief).

to change "the procedure to be followed if a death sentence is set aside. . . ." 228 Va. at 482, 323 S.E.2d at 122. Both the Fourth Circuit and the District Court agreed that this was the purpose of the amendment. (App. 9a, 25a). Prior to the statutory change, any jury sentencing in a capital case had to be done by the same jury which had convicted the defendant of capital murder. *Patterson*, 222 Va. at 660, 283 S.E.2d at 216. The Court ruled in *Evans II*, however, that Evans and Patterson were "not similarly situated . . . with respect to the amendment to the death penalty statutes." 228 Va. at 481, 323 S.E.2d at 122. The Court's basis for this conclusion was the fact that Evans' death sentence had been set aside *after* the effective date of the statutory amendment, whereas Patterson's death sentence was judicially invalidated before the effective date of the amendment. 228 Va. at 482, 323 S.E.2d at 122.

Thus, the effect of the Court's decision in *Evans II* was to create two classes with respect to the applicability of § 19.2-264.3: those capital defendants whose death sentences were set aside prior to the effective date of the statutory change; and those capital defendants, like Evans, whose death sentences were set aside and whose resentencing proceedings commenced after that date. Under *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), this classification must be presumed valid and must be sustained if it is rationally related to a legitimate governmental objective. And, as both courts below correctly noted (App. 9a, 25a), the "rational basis" test must be applied in the context of the particular objective of the legislation in question. *See Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

Every judge and every court which has reviewed Evans' claim has found that the classification at issue is rational. The Virginia Supreme Court found that "[b]ecause the . . . statutory change affects only the procedure to be followed if a death sentence is set aside, [it

is] more rational to classify individuals potentially affected by the change according to the time when the individual's death sentence was set aside . . . rather than at the time the person was originally tried and convicted." *Evans II*, 228 Va. at 482, 323 S.E.2d at 122. Judge Merhige concluded that the amendment "is a procedural change, and it is rational that its application be tied to the event which necessitates a resentencing procedure: vacating the original sentence." (App. 25a). And the Fourth Circuit found that "to apply the amendment only to those defendants whose sentences were vacated following the amendment's enactment is entirely rational." (App. 9a). When such a wide spectrum of courts and judges has unanimously agreed that the classification is rational, it is pointless for Evans to persist in his allegation that the rational basis test has not been satisfied. Indeed, this broad consensus of judicial opinion strongly militates against the exercise of this Court's certiorari power.

Both courts below correctly concluded (App. 9a, 25a) that Evans' case could not be reasonably distinguished from *Dobbert* where this Court found "nothing irrational" about Florida's decision to apply an amended death penalty statute to the petitioner in that case. 432 U.S. at 301. Evans has attempted to distinguish *Dobbert* by emphasizing that in rejecting Dobbert's equal protection claim this Court noted that "the new statute was in effect at the time of his trial and sentence," 432 U.S. at 301, and he points out that unlike the situation in *Dobbert*, the amended statute which was applied to him was not passed until "two years after [his] trial, and more than a year after his death sentence had become final." (Ptn. 17). This "distinction," however, ignores the obvious fact that in *Dobbert* a new procedural statute was permitted to govern the proceedings, *i.e.* Dobbert's "trial and sentence," which occurred after the effective date of the new law. Similarly, in Evans' case the new procedural statute has been permitted to govern the proceeding, *i.e.* the resentencing

trial, which was conducted after the amendment became effective. Thus, the type of a "line-drawing" done by the Virginia Supreme Court in Evans' case is the same type of "line-drawing" approved by this Court in *Dobbert*.[8]

The two state cases relied upon by Evans, *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981), and *Lee v. State*, 340 So.2d 474 (Fla. 1976), afford him no relief. As previously noted, whether any two given sets of defendants are "similarly situated" for equal protection purposes must be determined by reference to the purpose of the particular law to be applied. Both *Story* and *Lee* involved situations, unlike Evans' case, where the purpose behind the new statutes in question was to enact a constitutional death penalty statute to replace one which had been declared unconstitutional. The defendants in those cases, unlike Evans and unlike the defendant in *Dobbert*, had been tried and convicted pursuant to an unconstitutional statute just like the other class of defendants referred to in those cases whose sentences had been commuted to life imprisonment. Thus, in both *Story* and *Lee*, improper distinctions had been drawn between sets of defendants who were indeed "similarly situated" with respect to the particular statutes in question. *See Story*,[9] 440 A.2d at 491; *Lee*, 340 So.2d at 475.

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[8] While "drawing the line" according to when a death sentence is vacated is conceivably susceptible to abuse by intentional manipulation, that is an entirely separate claim and Evans' allegation that the Commonwealth intentionally manipulated his case has been rejected by every court which has considered it. (See below at 16-19).

[9] *Story* is also distinguishable from Evans' case in that it was based upon a finding by the Supreme Court of Pennsylvania that "the Legislature did not intend the [new statute] to apply to an offense committed prior to its effective date." *See*

(Continued on following page)

Given the procedural purpose of the statute at issue in Evans' case, the Supreme Court of Virginia, the District Court, and the Fourth Circuit have all correctly concluded that Evans and the defendant in *Patterson* were not "similarly situated" for equal protection purposes. Neither *Story* nor *Lee* casts any doubt upon the correctness of that conclusion.

II. THE COURTS BELOW PROPERLY FOLLOWED THE MANDATE OF 28 U.S.C. § 2254(D) AND REJECTED EVANS' CLAIM OF PROSECUTORIAL MISCONDUCT.

Despite the fact that his claim has been rejected, in turn, by a Virginia trial court judge, the unanimous Supreme Court of Virginia, a federal district court judge, and now, the unanimous Fourth Circuit, Evans persists in his allegation that the Commonwealth of Virginia has been guilty of "pervasive, gross and admitted misconduct."[10] (Ptn. 2). The claim is entirely without merit.

(Continued from previous page)

Commonwealth v. Crenshaw, 470 A.2d 451, 454 (Pa. 1983). *See also Story*, 440 A.2d at 489. Evans does not, and could not reasonably contend that the Virginia General Assembly did not intend for the amended version of § 19.2-264.3 to be applied to a case, like his, where the death sentence was invalidated *after* the effective date of the amendment. *See* Va. Code § 1-16 ("proceedings . . . shall conform, so far as practicable, to the laws in force at the time of such proceedings"). (A. 1a).

[10] Evans' petition is littered with mischaracterizations and half-truths. For example, Evans implies that the Commonwealth has admitted that it knowingly used false evidence. (Ptn. 2, 21-22). Nothing could be farther from the truth. The Commonwealth has consistently denied every allegation of bad faith or intentional error, and every court which has reviewed Evans' claim has decided the matter in the Commonwealth's favor. None of these courts has even suggested that the Commonwealth knowingly used false evidence.

When Judge Merhige was presented with Evans' claim, he concluded as follows:

> On September 21, 1983, the trial court conducted an extensive evidentiary hearing on Evans' claims of misconduct by the Commonwealth. The Court concluded with respect to the alleged misconduct by the trial prosecutors, that
>
> > the defendant has failed to prove to the satisfaction of the Court that the prosecution engaged in such misconduct or tactics as to warrant the Court in concluding that the Commonwealth is precluded from again seeking the death penalty.
>
> The trial court also found no purposeful or wrongful delay in the confession of error by the Commonwealth. Judge Wright ruled that the record did not show any tactical maneuvering by the Attorney General's Office with respect to the 1983 amendment. These findings were affirmed by the Virginia Supreme Court on direct appeal.[11] *Evans II*, 323 S.E.2d at 119-121.
>
> In making these factual findings, the trial court relied on an extensive evidentiary hearing and an *in camera* review of the original files of the Governor's Office and the Attorney General's Office relating to drafting, introduction, consideration, and approval of the 1983 amendment.

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[11] More specifically, the Supreme Court of Virginia found that "credible evidence supports the trial court's finding of fact" concerning the trial prosecutor, *Evans II*, 228 Va. at 478, 323 S.E.2d at 119, and that the trial court's finding that the Attorney General's Office had not deliberately delayed confessing error in Evans' case was supported by "credible, uncontradicted, and persuasive" evidence. 228 Va. at 479, 323 S.E.2d at 120.

> This Court has conducted a similar *in camera* review, and additionally has reviewed the Attorney General's file concerning Evans' original direct appeal. These records fail to provide any support for Evans' claim of prosecutorial misconduct.

(App. 23a-24a, footnote omitted). The Fourth Circuit also had no difficulty concluding that the state courts had made factual findings that the Commonwealth had acted in good faith. (App. 10a). Thus, the record belies Evans' assertion that the state courts "made no findings of fact at all." (Ptn. 19).

Both the District Court (App. 24a) and the Fourth Circuit (App. 10a) recognized that 28 U.S.C. § 2254(d) requires that the state courts' findings of fact be accorded a presumption of correctness. *See Sumner v. Mata*, 455 U.S. 591, 592 (1982). Both courts also found that the state courts' findings in this case are "fairly supported" by the evidence. (App. 10a, 24a). *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983).

The Commonwealth does not contend, and has never contended, that the fact that the petitioner's first death sentence was based, at least partially, upon evidence that was erroneous or misleading was a situation that did not demand a remedy. To the contrary, it was because of that defective evidence that the Commonwealth confessed error. The only remedy to which Evans was entitled under the Constitution, however, was a fair and impartial resentencing proceeding.

Even where the government is guilty of "deliberate" and "egregious" misconduct, an accused is not entitled to dismissal of the indictment in the absence of "demonstrable prejudice." *United States v. Morrison*, 449 U.S. 361, 365-367 (1981). Here, where the state courts have found that the Commonwealth acted in good faith, and those findings have been sustained by the courts below, there is

simply no constitutional basis for concluding that the error committed at Evans' original sentencing proceeding barred any subsequent imposition of a death sentence.[12] *See Arizona v. Youngblood*, ___ U.S. ___, 109 S.Ct. 333, 337 (1988); *United States v. Lovasco*, 431 U.S. 783, 790, 795-796 (1977); *United States v. Marion*, 404 U.S. 307, 325 (1971) (all three cases emphasizing petitioner's burden to show bad faith in order to sustain due process claim).

III. EVANS' CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON THE DIRECT APPEAL OF HIS ORIGINAL DEATH SENTENCE DOES NOT WARRANT CERTIORARI REVIEW.

Evans contends that he was denied the effective assistance of counsel when, in *Evans I*, his appellate attorneys failed to discover and bring to the attention of the Virginia Supreme Court the errors in the records of his prior convictions upon which his original death sentence was, at least in part, based.[13] While Evans contends that

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[12] By confessing error even though the error at the initial sentencing proceeding was unintentional, the Commonwealth recognized that, *with regard to the validity of the original death sentence*, the good or bad faith of the prosecutor was irrelevant. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963). The issue in this case, however, is not the validity of the original death sentence, but whether there was sufficient "misconduct" to bar a resentencing. For this reason, Evans is mistaken in asserting that the state courts' findings of good faith are "irrelevant" to the issue of whether a resentencing proceeding was barred. (Ptn. 21).

[13] To the extent Evans suggests that counsel were ineffective when they petitioned this Court for a writ of certiorari (Ptn. 23), the claim is entirely without merit. There is no constitutional right to counsel during such discretionary appeals, and consequently, no right to the effective assistance of counsel. *Ross v. Moffitt*, 417 U.S. 600, 617-618 (1974).

the lower courts' uniform rejection of his claim "eviscerates" his right to the effective assistance of counsel (Ptn. 22), he concedes that this Court has already "made plain" the standard of review which governs his claim and that the Fourth Circuit "recognized" the proper standard. (Ptn. 23). Thus, his argument that this Court "should grant certiorari to provide needed guidance concerning the proper application" of this standard (Ptn. 23) rings hollow. The mere fact that Evans disagrees with the way in which the standard was applied in his case is insufficient to warrant certiorari review.

The test in judging claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This two-part test requires a showing that counsel's performance was seriously deficient *and* that counsel's alleged errors resulted in actual prejudice. 466 U.S. at 687. The *Strickland* standard applies to claims against appellate counsel as well as to claims against trial counsel. *See Smith v. Murray*, 477 U.S. 527, 535-536 (1986).

The Fourth Circuit correctly applied this standard and found that Evans had failed both prongs of the *Strickland* test. (App. 14a-15a). As the court below correctly noted, counsel traveled to North Carolina prior to trial to investigate Evans' record of prior convictions. At that time the records in North Carolina were in a state of disarray. (App. 14a-15a). *See Evans II*, 228 Va. at 479, 323 S.E.2d at 120. Counsel objected to some of the records when they were introduced at trial. (App. 15a). After trial, counsel gleaned from the record Evans' most viable claims and raised them on appeal in the Virginia Supreme Court. (App. 15a). Evans' contention that counsel had an additional duty to go beyond the trial record and to raise on appeal a claim challenging the accuracy of Evans' record of prior convictions is simply untenable.

Appellate counsel had no duty to go outside the trial record because nothing beyond that record, even if it had

been discovered, would have been cognizable on appeal. It is beyond question that the "triple-certified" conviction records which were introduced at trial (A. 3a) could not have been proved to be erroneous without reference to matters outside the trial record, such as the affidavit that Evans' habeas counsel was unable to obtain until almost a year after Evans' state habeas petition was filed.[14] (A. 7a).

The Fourth Circuit, which is intimately familiar with Virginia law, recognized that in Virginia an appeal can only be decided upon matters of record. (App. 15a). "The Commonwealth and the defendant must stand or fall upon the case that was made in the lower court and reflected by the record under review. [The Virginia Supreme Court] is not a forum in which to make a new case." *Guthrie v. Commonwealth*, 212 Va. 602, 604, 186 S.E.2d 68, 70 (1972). *See also O'Dell v. Commonwealth*, 234 Va. 672, 696 n.8, 364 S.E.2d 491, 505 n.8, *cert. denied*, 109 S.Ct. 186 (1988) (rule applied in capital case). Indeed, this Court follows the very same rule. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970). Thus, Evans' underlying contention is antithetical to established principles of appellate practice. A failure by counsel to raise a non-cognizable matter on appeal simply cannot be the basis for a finding of deficient performance under the first prong of the *Strickland* test.[15]

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[14] Evans' contention (Ptn. 24-25) that an obscure reference to the word "nolle" in his post-sentence report (App. 43a) would have been sufficient to invalidate the triple-certified conviction records is ludicrous on its face. Moreover, any claim that counsel were ineffective in this regard *at trial* has long since been abandoned.

[15] The issue concerning the erroneous conviction records, of course, was properly raised and resolved during subsequent state collateral proceedings where the matter was fully cognizable. Indeed, under Virginia law, state habeas proceedings are

(Continued on following page)

Moreover, as both the District Court (App. 25a-26a) and the Fourth Circuit (App. 15a) concluded, Evans also failed to demonstrate *Strickland* prejudice. The claim which Evans contends his counsel should have raised on appeal related solely to a penalty-stage error, *i.e.* the admission of inaccurate conviction records. That error certainly entitled Evans to have "the slate wiped clean," but it did not guarantee that he could not be resentenced. *See Poland v. Arizona*, 476 U.S. 147, 152 (1986). The state courts have "wiped the slate clean" in this case by vacating Evans' original death sentence and by affording him an error-free resentencing proceeding. The Constitution entitled him to nothing more.

IV. THE COURTS BELOW CORRECTLY DETERMINED THAT DUE PROCESS DOES NOT REQUIRE THAT A CAPITAL SENTENCING JURY BE INSTRUCTED THAT IF IT IS UNABLE TO REACH A VERDICT THE TRIAL COURT WILL AUTOMATICALLY IMPOSE A LIFE SENTENCE.

Very shortly after retiring to deliberate at the petitioner's resentencing proceeding, the jury sent the trial judge the following question:

(Continued from previous page)

reserved solely for claims which could not have been litigated on appeal. *See Epperly v. Booker*, 235 Va. 35, 43, 366 S.E.2d 62, 66-67 (1988). Clearly, if on direct appeal Evans' attorneys had attempted to prove that the certified conviction records were inaccurate, the Commonwealth could have insisted that the matter be litigated in a habeas proceeding rather than on appeal.

> The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?[16]

After initially voicing the opinion that the jury should be told that its verdict must "be unanimous as to either penalty" and that the jury "must not concern [itself] with what may occur if [it is] unable to reach a verdict" (A. 5a), defense counsel reversed his position and requested the trial court to instruct the jurors that "if they cannot be unanimous on death, then it is life." The trial court denied counsel's request and instructed the jury that its "verdict must be unanimous as to either life imprisonment or death." (A. 5a).

On direct appeal, the Virginia Supreme Court held that the trial judge's instruction accurately reflected Virginia law. *See Evans II*, 228 Va. at 481, 323 S.E.2d at 121. Both the District Court (App. 27a) and the Fourth Circuit (App. 13a) concurred. Thus, Evans' argument is reduced to the preposterous assertion that the trial judge committed error of constitutional dimensions by accurately informing the jury that any verdict it reached must be unanimous and by refusing to tell the jurors, in effect, that they could avoid their joint responsibility to reach a verdict and thereby insure that Evans would receive a life sentence from the court.

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[16] Evans' rather strained assertion that the jury asked its question "in the heat of its deliberations" (Ptn. 27) is belied by the record. The jury first retired to the jury room at 1:05 p.m. (A. 4a). Shortly thereafter, the jury asked its question. After the issue was discussed among court and counsel, the court answered the question and then recessed the proceedings for lunch until 2:15 p.m. (A. 5a-6a). When the jury returned at 2:15, it recommenced its deliberations and did not return its verdict until shortly before 3:30 p.m. (A. 6a).

The courts below correctly rejected Evans' claim. This Court has recognized that, even in a capital case where the jury's inability to reach a verdict will result in an automatic life sentence, the State retains "a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.' " *See Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546, 551 (1988) (citation omitted). The instruction which Evans requested and which the trial judge refused could well have encouraged the jury to avoid its responsibility, thereby frustrating the Commonwealth's "strong interest" in having the jury determine Evans' sentence. Surely, due process did not require that the jury be given such an instruction.

Evans' reliance upon *State v. Williams*, 392 So.2d 619 (La. 1980), is misplaced. If the decision in *Williams* has any validity whatsoever, it would be limited to those instances, unlike Evans' case, where the jury has been deliberating a lengthy period of time before the question is asked and has announced to the court that it is deadlocked. *See Williams*, 392 So.2d at 639-640 (Lemon, J., concurring). In Evans' case the record provides no evidence of deadlock and clearly shows that the jury had been in the jury room only a short time before the question was asked. (A. 4a-5a).

Also misplaced is Evans' reliance upon another Louisiana case, *State v. Loyd*, 459 So.2d 498 (La. 1984). Although in *Loyd* there was no evidence of deadlock before the question was asked, the Louisiana court found evidence of judicial coercion in the fact that the jury had been deliberating for an hour before the question was asked and that it returned its verdict only eighteen minutes after the judge answered the question. 459 So.2d at 503. In Evans' case, there is not the slightest hint of coercion. After the trial judge answered the question, the jury went to lunch and then returned to deliberate for

more than an hour before it sentenced Evans to death.[17] (A. 5a-6a).

Both the District Court (App. 28a) and the Fourth Circuit (App. 13a) correctly rejected Evans' claim that the trial court's instruction had "misled" the jury about its role at a capital sentencing proceeding. Both courts below also properly rejected Evans' assertion that *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860 (1988), required a different conclusion.

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[17] Evans' contention that this Court should grant certiorari because the Fourth Circuit's rejection of his claim "squarely conflicts with the decisions of the highest courts of two other states" (Ptn. 26) is meritless. As previously shown, the Louisiana cases are clearly distinguishable on their facts. Moreover, there is no conflict with *State v. Ramseur*, 524 A.2d 188 (N.J. 1987). Contrary to Evans' assertion (Ptn. 26 n.34), *Ramseur* was expressly decided on non-constitutional grounds. *See* 524 A.2d at 282 ("we rest our decision on our state-law supervisory power over the administration of criminal justice"). And, as Evans concedes (Ptn. 26 n.34), the panel decision in *United States v. Arpan*, 861 F.2d 1073 (8th Cir. 1988), has been vacated. *See* 867 F.2d 1188 (8th Cir. 1989). Thus, Evans' "conflict" argument for granting certiorari is left totally without support. Various state courts have rejected, as Virginia's courts have done, the claim that a capital sentencing jury must be instructed that a life sentence will be imposed if it cannot reach a verdict. *See, e.g., People v. Kimble*, 749 P.2d 803, 822-825 (Cal.), *cert. denied*, 109 S.Ct. 188 (1988); *Johnson v. State*, 731 P.2d 993, 1005 (Okla. Cr. App.), *cert. denied*, 484 U.S. 878 (1987); *Calhoun v. State*, 468 A.2d 45, 59-60 (Md. 1983); *State v. Copeland*, 300 S.E.2d 63, 70-71 (S.C. 1982), *cert. denied*, 460 U.S. 1103 (1983); *Coulter v. State*, 438 So.2d 336, 346 (Ala. Cr. App. 1982); *State v. Smith*, 292 S.E.2d 264, 276 (N.C.), *cert. denied*, 459 U.S. 1056 (1982); *Houston v. State*, 593 S.W.2d 267, 278 (Tenn. 1980); *Jones v. State*, 281 So.2d 983, 992 (Miss.), *cert. denied*, 449 U.S. 1003 (1980); *Dick v. State*, 273 S.E.2d 124, 131 (Ga. 1980), *cert. denied*, 451 U.S. 976 (1981).

Mills is inapplicable unless there is a "substantial probability" that the jury was misled into believing that a death sentence was, in some sense, mandatory, or that the jury was precluded from considering evidence in mitigation. 108 S.Ct. at 1870. When a Virginia jury receives penalty-stage instructions such as those that were given in this case, there is no danger that a jury could conclude that a death sentence is mandatory. *See, e.g., Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir.), *cert. denied*, 108 S.Ct. 1459 (1988).

Nor is there any merit to Evans' claim that the trial court's instruction could have misled individual jurors into believing that he or she was powerless to effect a life sentence. The trial court's answer to the jury's question must be viewed " 'in its context and under all the circumstances.' " *See Lowenfield*, 108 S.Ct. at 550 (citation omitted). As the Fourth Circuit so aptly stated:

> [T]he trial judge's response to the jury's inquiry left no doubt that a non-unanimous verdict could not result in death.***The jury was simply told that any verdict must be reached unanimously. During *voir dire*, moreover, each juror was informed that even as a minority of one, he or she could hold out if convinced that a life sentence was appropriate. At closing, defense counsel reminded the jury that their sentence must be unanimous.[18] Finally, when polled individually, each juror affirmed the verdict as his or her own.

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[18] Defense counsel was permitted to remind the jury that its decision was "irrevocable" and to argue that "they cannot take . . . Evans' life unless you unanimously, every one of you, all twelve of you say death penalty." Counsel also reminded the jurors of their "promise" during voir dire to "stick by your

(Continued on following page)

(App. 13a). Under these circumstances, there is simply no factual basis for a conclusion that Evans' jury was in any sense misled by the trial court's instruction.

CONCLUSION

This is the fourth occasion on which Evans has asked this Court to review his case. Just as the Court has done on each of the three prior occasions, certiorari review should be denied.

As petitioner admitted when last before this Court, his case is extraordinarily fact-bound. (See Evans' petition in No. 86-1754 at 3; "extraordinary confluence of events"). Evans made a similar concession in the Fourth Circuit. (See Evans' reply brief at 15 n.23; "the unique factual circumstances in this case will seldom be repeated"). Thus, the issues raised by Evans are unlikely to recur, and his case will have little, if any, impact beyond the parameters of its own facts. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955); *Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *See also Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (" 'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.' ").

Moreover, this case has been scrupulously reviewed for constitutional error, not only by the state courts, but also by Judge Merhige and by a unanimous Court of Appeals. No such error has ever been found.

(Continued from previous page)

conviction [even] if a vote was taken and you were in the minority." (A. 3a-4a). And, as the District Court noted, each and every juror had sworn during voir dire "to vote according to his own conclusions." (App. 28a).

Thus, Evans has clearly failed to demonstrate any "special or important" reason why this case should be reviewed on certiorari. *See* U.S. Sup.Ct.R. 17.1. For these reasons, the petition should be denied.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

*DONALD R. CURRY
Senior Assistant Attorney General

*Counsel of Record

October 26, 1989

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

Va. Code § 1-16 (in relevant part):

> **Repeal not to effect liabilities; mitigation of punishment.** – No new law shall be construed to repeal a former law. . . .save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

Va. Code § 18.2-10(a) (in relevant part):

> **Punishment for conviction of felony.** – The authorized punishments for conviction of a felony are:
>
> (a) For Class 1 felonies, death, or imprisonment for life.

Va. Code § 18.2-31(f) (in relevant part):

> **Capital murder defined; punishment.** – The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> * * *
>
> (f) The willful, deliberate and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties;

28 U.S.C. § 2254(d) (in relevant part):

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless. . . .

* * *

(8) . . . the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record. . . .

TRIAL TRANSCRIPT PAGE 582 (excerpt)

THE COURT: Except for the certification of the clerk which states the foregoing and a copy of the indictment, the warrant and the judgment and the commitment and it makes reference to 96.8. The clerk has certified this is the indictment that corresponds to 96.8.

Given that certification, notwithstanding the fact that the indictment does not have a number on it, I'm satisfied as to its admissibility.

MR. LONG: I object to it.

THE COURT: All right, sir. Make that the next number if you will, please.

THE CLERK: Twenty-one.

THE COURT: All right.

(The document previously referred to was marked Commonwealth's Exhibit No. 21 for identification.)

TRIAL TRANSCRIPT DATED 9-21-83 PAGE 46 (excerpt)

[Referring to Commonwealth's Exhibit 21]

MR. KLOCH: . . . First of all, we had some difficulty getting it from North Carolina. It was a triple certified document. I hesitate to even touch let alone fold and recopy them, because there have been numerous objections, even if there's a staple removed, that something has been changed.

RESENTENCING TRANSCRIPT DATED 2-3-84 (excerpts)

PAGE 38:

[DEFENSE COUNSEL]: And I respectfully hope that in your deliberations you want to make the right

decision. You want to make the right decision because your decision on death is irrevocable, they cannot take Lee Evans' life unless you unanimously, every one of you, all twelve of you say death penalty. Don't make a mistake.

PAGES 51-52:

[DEFENSE COUNSEL]: You made Lee Evans and myself a promise the first day of these deliberations and that is when you went back to the jury room you would come to grips with yourself, your own thoughts, your sense of fairness, your sense of justice, you would make up your minds individually and collectively, because you are going to discuss this case and the instructions of the Court. But once you made a decision, that you would stick by that decision, you would stick by your conviction. And if a vote was taken and you were in the minority, that you would not yield, you would stand by your convictions. I just remind you of that and ask you humbly to stick by your convictions, don't waver. If you believe this man deserves life, don't waver. Stick to your guns.

PAGES 61-62:

THE COURT: The jury may retire to consider its verdict.

(Whereupon, the jury retired to the jury room.)

THE COURT: The Court will recess to await the verdict of the jury.

(Whereupon, a recess was taken.) (1:05 p.m.)

THE COURT: Gentlemen, I have received a question from the jury and I wanted to give you a chance to express your thoughts as to how I should respond before I brought the jury back in to answer the question. The

question reads as follows, "The decision must be unanimous for death, must the decision also be unanimous for life, or does a split decision automatically become life?"

* * *

THE COURT: I just looked at [the statute]. It says if the jury is unable to reach a verdict, the Court imposes a sentence of life. But I don't think I should tell the jury that. I think I should tell the jury, your verdict must be unanimous as to either penalty and you must not concern yourself with what may occur if you are unable to reach a verdict, because it has to be unanimous to return a life verdict as well.

[DEFENSE COUNSEL]: Your Honor, we respectfully agree that that would be the appropriate instruction.

PAGES 66-67:

THE COURT: Ladies and gentlemen, I have your question which reads as follows, "The decision must be unanimous for death. Must the decision also be unanimous for life, or does a split decision automatically become life?"

You are instructed that your verdict must be unanimous as to either life imprisonment or death.

You may resume your deliberations. Do you want to go to lunch sometime soon? . . . What is your preference?

THE JURORS: Lunch.

THE COURT: All right. We will recess until 2:15.

* * *

The Court will recess until 2:15.

(Whereupon the jury was temporarily excused for luncheon recess.)

THE COURT: All right. Gentlemen, we will recess then until 2:15.

(Whereupon, the proceedings were recessed, to convene at 2:15 o'clock p.m.)

PAGES 72-73:

THE COURT: The record will reflect that the defendant and his counsel were present at all stages of the trial and the defendant was capably represented.

The defendant will be remanded to the custody of the Sheriff.

The Court will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:30 o'clock p.m., the proceedings were concluded.)

AFFIDAVIT

RUSSELL NIPPER, being first duly sworn, deposes and says as follows:

1. My name is Russell Nipper. I am now, and for some time have been both the Clerk of the Superior Court for Wake County, North Carolina, and of the District Court for Wake County, North Carolina. In those capacities, I have in my custody and control all the records of these courts.

2. At the request of Jonathan Shapiro, attorney for Wilbert Evans, and Jerry Slonaker, Assistant Attorney General for the Commonwealth of Virginia, I had occasion to thoroughly check the files of both the District Court and the Superior Court concerning several cases in which Wilbert Lee Evans was a defendant. Specifically, I was asked to determine the following information:

* * *

3-22-83.

[signed Russell Nipper]
Russell Nipper
Clerk of the District and
Superior Courts

Sworn to and subscribed
before me this the 22nd day
of March, 1983.

*[signed by Vickie U.
Rumsden]*
Notary Public

No. 89-516

In The

Supreme Court of the United States

October Term, 1989

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 22.6, respondent is filing this supplemental brief only because the petitioner has asserted in his reply brief a reason for granting the writ which, by his own admission (Reply 1-2), he did not assert in his petition.

EVANS HAS ATTEMPTED TO MANUFACTURE A "CONFLICT" WHERE NO CONFLICT EXISTS.

In his reply brief, petitioner asserts that this Court should grant certiorari to resolve an alleged "conflict" between the decision below and a decision by the United States Court of Appeals for the Fifth Circuit in *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). This strained effort to fabricate a "cert-worthy" issue in his case should be rejected.

Regardless of whether the Fifth Circuit's *ex post facto* analysis is harmonious with this Court's prior decisions – and the respondent certainly does not concede that it is – the facts in *Youngblood* are hardly comparable to those in Evan's case. *Youngblood* was a non-capital case where the jury's unitary verdict was so substantively defective when rendered that, under then-existing Texas law, Youngblood's conviction *and* sentence were both void *ab initio*. 882 F.2d at 958 ("At the time Youngblood was convicted, the jury rendered a verdict that was unauthorized by law."). Thus, when a subsequently enacted state law was retroactively applied to Youngblood, the effect was to legislatively convert his void conviction and life sentence into valid judgments. Under such extreme circumstances, it is at least plausible that a

reviewing court could conclude, as the Fifth Circuit did, that Youngblood had been denied a "substantial right." 882 F.2d at 960.

Evans' case, on the other hand, is a capital case where his conviction and death sentence were, under Virginia law, presumptively valid when the jury, in a bifurcated proceeding, returned its separate verdicts. *See Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526, *cert. denied*, 464 U.S. 865 (1983) ("the proceedings of the trial court are presumed to be correct unless or until they are reversed on appeal."). Unlike the situation in *Youngblood*, there was certainly no error in Evans' case which rendered either his conviction or his original death sentence void *ab initio*. And when the subsequently enacted Virginia law, which became effective *before* Evans' original death sentence was vacated, was applied to his resentencing proceeding, the effect was merely procedural, *not* substantive. As both courts below correctly recognized (App. 6a, 21a), the punishment attached to petitioner's offense was precisely the same both before and after the new law was enacted, and the amendment's only effect was to alter the procedure to be followed if and when a death sentence is judicially invalidated.

In no sense within the meaning of the *ex post facto* clause was Evans denied a "substantial right." Indeed, Evans received the very same "substantial right," *i.e.* the right to a retrial free from error, which the defendant in *Youngblood* was, according to the Fifth Circuit, impermissibly denied. *See* 882 F.2d at 960. Thus, *Youngblood* simply cannot form the basis for an argument that there is a "conflict" warranting certiorari review.

CONCLUSION

Petitioner committed his capital murder of a law enforcement officer almost nine years ago. When error was subsequently discovered concerning his original death sentence, that sentence was vacated by the state trial court, and in 1984 he was resentenced to death in an error-free proceeding. Since then, none of the many judges and courts which have reviewed the merits of his claims has even suggested the presence of constitutional error in his case. The supposed "conflict" which Evans has belatedly asserted in an effort to forestall the resolution of his case does not constitute a proper ground for the granting of certiorari review. For these reasons, and those set forth in the respondent's brief in opposition, Evans' petition should be denied.

Respectfully submitted,

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November 14, 1989

No. 89-516

In The

Supreme Court of the United States

October Term, 1989

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 15.7, respondent is filing this supplemental brief to direct the Court's "attention to new cases . . . not available at the time of the [respondent's] last filing."

SUPPLEMENTAL REASON FOR DENYING THE WRIT

FEDERAL HABEAS RELIEF IS NOT AVAILABLE TO PETITIONER BECAUSE THE *EX POST FACTO* RULE HE PROPOSES WOULD CONSTITUTE A "NEW RULE."

Evans' petition for a writ of certiorari has been pending in this Court since September 27, 1989. In his reply brief filed on November 7, 1989, Evans asked this Court to grant certiorari to resolve an alleged "conflict" between the decision below and *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). This Court, however, subsequently granted Texas' certiorari petition in *Youngblood*, *see* 110 S.Ct. 560 (1989), and Evans' case has remained in its current "pending" status.

This Court has recently decided two cases which have clarified the "new rule" principle which the Court had announced earlier in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989). *See Butler v. McKellar*, ___ U.S. ___, 110 S.Ct. ___ (March 5, 1990); *Saffle v. Parks*, ___ U.S. ___, 110 S.Ct. ___ (March 5, 1990). Under *Teague*, a "new" decision is generally inapplicable in cases on collateral review unless the decision was "dictated" by precedent at the time the prisoner's case became final. *See Teague*, 109 S.Ct. at 1070. In *Butler*, however, this Court stated for the first

time: "The 'new rule' principle . . . validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 110 S.Ct. at ___, slip op. at 6. *See also Parks*, 110 S.Ct. at ___, slip op. at 4.

In Evans' case, there is no question that, at the time his death sentence became final, the Virginia Supreme Court had made a "reasonable, good faith interpretation of existing precedents" and concluded that there had been no *ex post facto* violation. Indeed, in view of *Dobbert v. Florida*, 432 U.S. 282 (1977), and earlier cases such as *Mallett v. North Carolina*, 181 U.S. 589 (1901), it certainly cannot be said that a contrary result was "dictated" by this Court's precedents. *See Parks*, 110 S.Ct. at ___, slip op. at 6 (petitioner proposes "new" rule where existing precedent does not "compel" the rule he seeks).

The reasonableness and the good faith of the Virginia Supreme Court's decision in this case is underscored by the fact that the federal district court judge and the Fourth Circuit reached the same conclusion.* *See Butler*, 110 S.Ct. at ___, slip op. at 7 ("That the outcome . . . was susceptible to debate among reasonable minds is evidenced . . . by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits. . . ."). *See also Butler* (Brennan, J., dissenting), slip op. at 2 (under *Butler*, "a state prisoner can secure [federal] habeas relief only by showing that the

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* Also reaching the same conclusion under similar facts is the unanimous Tenth Circuit decision in *Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989).

state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist").

CONCLUSION

The primary reason why certiorari should be denied in this case remains the fact that petitioner's *ex post facto* claim is meritless. Nevertheless, the *ex post facto* rule proposed by Evans, if adopted, would constitute a "new rule" within the meaning of *Butler* and *Parks* because the result he advocates was not dictated by precedent and because the Virginia courts faithfully and reasonably applied the *ex post facto* principles in effect at the time Evans' death sentence became final. Therefore, federal habeas relief is unavailable and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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March 9, 1990

(6)

No. 89-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-516

WILBERT LEE EVANS,

Petitioner,

v.

CHARLES THOMPSON, SUPERINTENDENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S SUPPLEMENTAL BRIEF

This is a capital case on writ of certiorari from the denial of Petitioner's first federal petition for a writ of habeas corpus. Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States, Evans respectfully submits this supplemental brief in support of his petition.

On September 27, 1989, Evans filed with this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, presenting,

inter alia, the question of whether a state violates the *ex post facto* clause of the United States Constitution when it retroactively strips from the defendant a complete statutory defense to imposition of a particular punishment (in this case, death) and permits the state to impose punishment in a manner expressly forbidden under the law in place at the time of the defendant's offense and trial. *Evans v. Thompson*, 881 F.2d 117 (4th Cir.), *cert. pending*, No. 89-516 (filed September 27, 1989). Evans' petition is currently pending with the Court.

This Court has recently granted certiorari in two cases presenting *ex post facto* claims similar to those raised by Evans in his pending petition. *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir.), *cert. granted*, 110 S.Ct. 560 (1989), presents the question of whether a state may retroactively deprive a criminal defendant of the right, guaranteed by the law in place at the time of the defendant's offense and trial, to an order granting a new trial, and prohibiting the imposition of punishment, upon proof of error in the jury's verdict.[1] On March 26, 1990, this Court granted a writ of certiorari to the Eighth Circuit in *Rust v. Gunter*, 889 F.2d 1093 (8th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3614 (U.S. Mar. 26, 1990) (No 89-5900), to address, among other issues, the question of whether it violates the *ex post facto* clause for a state to apply retroactively a statute permitting imposition of a particular punishment—in Rust's case, solitary confinement—prohibited by the statutes and regulations in place at the time the defendant's criminal offenses were committed.

The *ex post facto* issues raised in *Youngblood* and *Rust* are substantially similar to those presented in Evans' petition, and the outcome in *Youngblood* and *Rust* may well control the disposition of Evans' case.

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[1] Evans filed a Brief Amicus Curiae in Support of Respondent in *Youngblood*. *See* Brief of Wilbert Lee Evans as Amicus Curiae in Support of Respondent, filed February 26, 1990.

For that reason, Evans respectfully requests that this Court hold consideration of Evans' petition pending its resolution of both *Youngblood* and *Rust*, or grant Evans' petition, in order that it may be considered along with *Youngblood* and *Rust*.

Respectfully submitted,

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April 23, 1990

No. 89-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILBERT LEE EVANS,
Petitioner,

v.

CHARLES THOMPSON, Superintendent,
Mecklenburg Correctional Center,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This is a capital case on writ of certiorari from the denial of Evans' first and only federal petition for a writ of habeas corpus. Evans respectfully submits this Reply Brief in support of his Petition.

I. THE FOURTH CIRCUIT'S DECISION CONSTRUING *DOBBERT v. FLORIDA* SQUARELY CONFLICTS WITH A RECENT DECISION OF ANOTHER FEDERAL CIRCUIT COURT.

In the Petition we demonstrated that the lower state and federal courts have created a wide array of confusing and inconsistent decisions construing *Dobbert v. Florida*, 432 U.S. 282 (1977). We noted that one federal circuit in an *en banc* decision has created a significant exception to *Dobbert*, by reading the federal due process clause to prohibit what *Dobbert* had allowed under the *ex post facto* clause[1]; and that state courts within the same jurisdiction have repeatedly disagreed over how to apply *Dobbert*.[2] We did not, however, argue

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[1] *See Coleman v. McCormick*, 874 F.2d 1280, 1286 & n.7 (9th Cir.) (*en banc*), *cert. denied*, 58 U.S.L.W. 3289 (Oct. 31, 1989).

[2] *See* Pet. 10-11 n.9. References to the Petition will be designated "Pet. ——"; to the Appendix accompanying the Petition, "App. ——"; and to Respondent's Brief in Opposition, "Opp. ——."

In the Petition we cite three state supreme court decisions which rejected or limited *Dobbert*. Pet. 11 n.9. Respondent's effort to distinguish these cases, Opp. 11 n.6, fails to recognize the obvious: in each instance the court expressly considered and rejected the state's argument that the new sentencing law was merely a procedural change permitted by *Dobbert*. *See Thigpen v. Thigpen*, 541 So. 2d 465, 467 (Ala. 1989); *State v. Rodgers*, 242 S.E.2d 215, 217-18 (S.C. 1978); *Meller v. State*, 581 P.2d 3, 4 n.3 (Nev. 1978) (per curiam).

The two federal cases cited by respondent are plainly distinguishable. *See* Opp. 11 n.6, citing *Jordan v. Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *Knapp v. Cardwell*, 667 F.2d 1253, 1262-63 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982). Both stand only for the proposition, resolved by *Dobbert*, that the state may lawfully apply a new, ameliorative capital sentencing statute to defendants who committed their crime at a time when the state had in place a capital statute later declared unconstitutional.

that the circuits were in conflict on this issue. That has now changed.

A decision of the United States Court of Appeals for the Fifth Circuit published after the filing of the Petition squarely conflicts with the Fourth Circuit's decision here. That case, *Youngblood v. Lynaugh*,[3] involved retroactive application of a Texas law allowing judges to correct defective criminal judgments (by *lessening* the penalty) without requiring a retrial. At first glance, Texas' new sentencing law might seem to do no more than change "modes of procedure which do not affect matters of substance."[4] As the Fifth Circuit noted, the new law did not "fit neatly within the confines" of the *ex post facto* "pigeon holes" created by this Court's recent decisions: it did "not punish as a crime a previously innocent act, or make more burdensome the punishment of a crime after its commission or deprive the defendant of a defense available at the time the act was committed."[5] Nevertheless, citing decisions of this Court, the Fifth Circuit concluded that retroactive application of Texas' new "procedure" for modifying defective sentences violated the *ex post facto* clause, because it deprived the defendant of a "substantial right"—in that case, the opportunity, upon a new trial, to obtain a lesser sentence, or even an acquittal.

The retroactive change authorized by the Fourth Circuit in the case at bar is far more draconian than the

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[3] 882 F.2d 956 (5th Cir., Sept. 8, 1989). Respondent makes much of the fact that no member of the Fourth Circuit voted in favor of rehearing *en banc* in Evans' case. Opp. 4. By the same token, not a single judge on the entire Fifth Circuit voted to rehear the *Youngblood* case. *See* 1989 U.S. App. LEXIS 16160 (Oct. 19, 1989) (order denying State's petition for rehearing *en banc*).

[4] *See* Opp. 7, quoting *Dobbert v. Florida*, 432 U.S. at 293.

[5] *Youngblood v. Lynaugh*, 882 F.2d at 959. In the case at bar respondent contends, and the Fourth Circuit found, that a state statute does not violate the *ex post facto* clause unless it fits into one of those "pigeon holes." *See* Opp. 7-8; App. 6a-7a. The Fifth Circuit expressly rejected that same argument.

one prohibited by the Fifth Circuit in *Youngblood*. As the court below explicitly recognized, under the law in place at the time of Evans' crime, sentencing and appeal, "if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process *it was foreclosed from seeking capital resentencing* and the defendant received an automatic sentence of life imprisonment." (App. 5a) (emphasis added). In Evans' case, the new law retroactively allowed the Commonwealth to seek resentencing, thereby stripping Evans of the "automatic sentence of life imprisonment" that he would have received under the prior law, and exposing him instead to the renewed prospect of a greater punishment—death.

Youngblood is significant not only because it squarely conflicts with *Evans*, but also because two members of the three-judge panel, in separate concurring opinions, recognized the confusion surrounding this area of the law and pointedly requested guidance from this Court.[6] We highlighted that same problem in both the Petition and the briefs below by prominently discussing four separate lines of authority in which courts, including this Court, have squarely rejected as *ex post facto* laws that appear to do no more than alter modes of procedure.[7] Both respondent and the Fourth Circuit studiously failed even to mention these established lines of cases, let alone reconcile them with the unprecedented result reached

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[6] *Youngblood v. Lynaugh*, 882 F.2d at 961 ("I fear that the Supreme Court's decisions offer little guidance" in deciding *ex post facto* cases) (Jones, J., concurring). *See also id.* at 960 ("[T]he Supreme Court's 'modes of procedure' authorities such as *Thompson v. Utah* . . . constitute[] more of a bright spectrum than a bright line.") (Gee, J., concurring).

[7] *See* Pet. 14-15 & notes 11-14. Among those cases is *Thompson v. Utah*, 170 U.S. 343 (1898), which the Fifth Circuit expressly relied upon in *Youngblood*, but the Fourth Circuit and respondent have failed to mention. In the Petition we also underscored three significant factual distinctions between *Dobbert* and this case, and noted that the Fourth Circuit had failed to address any of these points. *See* Pet. 13. Respondent likewise fails to address any of these important distinctions. *See* Opp. 7-8.

here. This Court should grant certiorari to resolve the conflict in the circuit and state court decisions and provide needed guidance in this unsettled area of law.

II. THE COMMONWEALTH'S EGREGIOUS AND ADMITTED MISCONDUCT VIOLATED DUE PROCESS.

As set forth in detail in the Petition and Appendix, this case involves a two-year pattern of gross prosecutorial misconduct. That misconduct is uncontestable: every one of the Commonwealth's wrongful acts is established by either the contemporaneous documentary evidence or the sworn admissions of two Commonwealth prosecutors. The misconduct allowed the state knowingly to secure a death sentence based on false evidence; falsely to defend that death sentence for two full years; to lobby for emergency legislation permitting capital resentencing at the same time that it was defending the sentence; and then to confess the misconduct on the day the emergency amendment authorizing resentencing was signed into law.

Respondent's entire "argument" on the merits of this claim consists of two unsupported assertions, which are relegated to a footnote: that "Evans' petition is littered with mischaracterizations and half-truths," and that the Commonwealth never admitted to the knowing use of false evidence. (Opp. 16 n.10). No amount of self-serving denial can alter the facts, which respondent does not even deign to address: [8]

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[8] Rather than discuss the facts, respondent simply quotes a lengthy (and largely irrelevant) passage from the district court's opinion, while shamelessly trading upon Judge Merhige's "reputation" as someone with "special concern for petitioners facing death sentences . . . ." Opp. 5 n.3 & 17-18. The lower courts' opinions should stand or fall solely on their merits, not on the supposed "reputations" of their authors. Moreover, contrary to respondent's suggestion, Evans filed his habeas petition in Richmond rather than Alexandria because it was far removed from the locale of both the crime and the prosecutorial misconduct. There are several federal judges sitting in Richmond; and as respondent well knows, cases filed in that court are assigned on a random basis.

(i) *It is a fact* that the prosecutor knew two months before the trial that Evans did not have a record of seven prior convictions, and that court documents which seemed to indicate that he did were flawed and erroneous. The prosecutor's files include a written report, prepared two months before trial, that unmistakably shows these flaws. (App. 29a-30a).

(ii) *It is a fact* that the prosecutor placed the flawed conviction records into evidence without telling judge or jury of the flaws. The trial transcript shows what the prosecutor did and said (App. 31a-40a, 87a), and the prosecutor himself (Mr. Kloch) later admitted under oath that he knew about the flaws in the "conviction" records long before trial. (App. 92a-95a).

(iii) *It is a fact* that the Commonwealth cited the false evidence in pleadings filed with both the Virginia Supreme Court and this Court, and that the Virginia Supreme Court unwittingly relied upon the false evidence. (App. 50a-57a). *See Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816, 820, 823 (1981), *cert. denied*, 455 U.S. 1038 (1982) (*"Evans I"*).

(iv) *It is a fact* that the Commonwealth's trial prosecutor knew of the Virginia Supreme Court's unwitting error—he read an advance copy of that Court's opinion in *Evans I*—but did nothing in the next two years to correct that error. (App. 97a-98a).

(v) *It is a fact* that when Evans explicitly challenged the Commonwealth's "conviction" evidence in state habeas pleadings (filed a full year before the new sentencing law was adopted), the Commonwealth denied those allegations, even though its own prosecutor knew them to be true. (App. 58a-76a, 83a-86a).

(vi) *It is a fact* that by January 1983 Assistant Attorney General Slonaker, the man responsible for resisting Evans' state habeas petition,

had irrefutable proof that Evans' allegations were true. Slonaker learned the truth in a face-to-face meeting with the trial prosecutor in January (App. 98a-99a, 115a-117a; *see* Pet. 7-9), and from letters sent by the clerk of the court in North Carolina and received on January 24, 1983. (App. 77a-82a, 117a).

(vii) *It is a fact* that the Commonwealth continued to deny the known wrongdoing, including in a court pleading filed on March 3, 1983, until Virginia's new capital sentencing statute was enacted on March 28, 1983. (*See* App. 83a-86a).

None of these crucial and uncontested facts is even mentioned in the Opposition. None is discussed or examined in either of the opinions below. And most significantly, no facts whatsoever (much less those listed above) are mentioned in the two-sentence order of the state trial judge who first rejected Evans' claims and whose nonexistent "factfinding" is said to command deference. (*See* App. 119a). This Court should grant certiorari to instruct the lower courts that, in the absence of clear factfinding by the state courts, particularly in capital cases, federal law requires a far more searching examination of the record evidence than what occurred here.

III. EVANS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE APPEAL.

As we showed in the Petition, throughout the year-long appeal Evans received " 'egregious and prejudicial' " [9] assistance from his counsel, who somehow failed to discover that their client had been sentenced to death on the basis of false and inadmissible evidence. Respondent's principal answer to this claim rests on the erroneous assertion, repeated no fewer than five times, that Evans' counsel could not have proved the error without "go[ing] outside the

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[9] *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (citations omitted).

trial record."[10] That is simply untrue. The trial judge who sentenced Evans ordered that the probation officer's "post-sentence report" be filed "*as part of the record of this case.*"[11] That report plainly stated that the most serious prior "conviction" introduced at Evans' capital sentencing—assaulting a police officer with a deadly weapon—had been nolle prossed and, thus, was no conviction at all.

In a footnote, respondent calls this point "ludicrous" and the word "nolle" "obscure." (Opp. 21 n.14). To competent defense counsel, the word "nolle"—placed next to a serious felony charge on a list of the defendant's prior record—is no more obscure than the words "not guilty" are to a layman. Had Evans' counsel paid any attention to the post-sentence report, they would have known that it directly contradicted the trial evidence on which Evans' death sentence rested.[12] It is not "ludicrous" to require counsel in a capital case to read carefully the probation report, which can decisively influence whether the defendant will live or die.

Respondent's repeated assertion that the trial record contained no evidence of error is also disingenuous. The Commonwealth's own prosecutor testified that he told defense counsel on the day of the sentencing hearing that some of the prior "convictions" were erroneous. (App. 100a-103a). Although that testimony is highly suspect, respondent cited and relied upon it in its brief below,[13]

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[10] Opp. 20. Contrary to respondent's contention, we have not argued that Evans' counsel "had an additional duty to go beyond the trial record." Opp. 20. Even a cursory examination of pages 23-25 of the Petition demonstrates that respondent has simply misstated Evans' argument, and then rebutted its own misstatement.

[11] Sentencing order of Hon. Wiley R. Wright, Jr., June 1, 1981. App. 49a (emphasis added).

[12] *See* Pet. 24-25.

[13] *See, e.g.*, Brief of Appellee at 14 (filed Dec. 19, 1988).

and the Fourth Circuit appears to have credited it.[14] Thus, if respondent's account is correct, the record contained additional, clear evidence of constitutional error.

Finally, respondent simply ignores Evans' argument concerning prejudice. Contrary to respondent's contention (Opp. 22), the "'slate'" was not and could not be "'wiped clean'" by an "error-free resentencing proceeding."[15] Evans suffered lasting prejudice because but for his counsel's incompetence, his capital sentence would have been vacated long before March 28, 1983, when the only permissible penalty was an automatic sentence of life imprisonment. (*See* Pet. 22, 25).

IV. THE DECISION BELOW REJECTING EVANS' CLAIM CONCERNING THE JURY INSTRUCTION SQUARELY CONFLICTS WITH STATE SUPREME COURT DECISIONS.

During deliberations at Evans' 1984 resentencing hearing, the jury asked an important question that plainly indicated juror disagreement, if not deadlock: "The decision must be unanimous for death, must the decision also be unanimous for life, or *does a split decision automatically become life*?"[16] The correct answer to that question is clear: under Virginia law, a "split decision" *does* automatically result in a sentence of life imprisonment.[17]

Respondent does not argue otherwise, but instead asserts that it would be "preposterous" to require the trial judge to disclose this information to the jury. (Opp. 23). Even if that position were defensible, respondent ignores the fact that in this case the court's response—which essentially answered a different question than the one the jury had asked—could only have left the misleading

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[14] *See* App. 10a-11a ("[D]uring the sentencing proceeding, the prosecutor advised defense counsel of the discrepancies regarding the convictions . . . .")

[15] Opp. 22, citing *Poland v. Arizona*, 476 U.S. 147, 152 (1986).

[16] App. 122a (emphasis added).

[17] *See* Va. Code § 19.2-264.4(E) (1983); *see also* Pet. 27 n.35 & authorities cited therein.

impression that Evans would not receive a life sentence unless the jury's verdict was unanimous for life.[18] That answer created precisely the kind of jury confusion that this Court found objectionable in *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985)—a case prominently discussed in the Petition, but ignored by respondent.

As explained in the Petition (at 28-29), the decision below squarely conflicts with two decisions of the Louisiana Supreme Court involving facts and issues virtually identical to those presented here.[19] In each instance the Louisiana court held that, in the unique circumstances of capital sentencing, the federal Constitution requires a direct and candid response to jury questions about the effect of a split decision.

Respondent's efforts to distinguish the Louisiana decisions have no basis in fact. Contrary to respondent's contention (Opp. 24), there was no "evidence of judicial coercion" in *Loyd*—other than the "pressure" caused by the trial court's erroneous response to the jury question. *Loyd*, 459 So. 2d at 503. Nor was there any suggestion that the constitutional principle articulated in *Loyd* should turn on the length of the jury deliberation. Such a rule would, in any event, be plainly unworkable.[20]

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[18] The court's response—"your verdict must be unanimous as to life imprisonment or death" (App. 123a)—was an accurate statement of the law in the sense that "verdict" as a technical term can only mean a unanimous decision of the jurors. The jury, however, was not seeking guidance on that arcane legal question. Rather, the jury wanted to know what Evans' fate would be if one or more of their members held out for life imprisonment. Read in context, the judge's response could only have created the erroneous impression that if the jury remained divided, the result would *not* be automatic imposition of a life sentence.

[19] *See State v. Loyd*, 459 So. 2d 498 (La. 1984); *State v. Williams*, 392 So. 2d 619 (La. 1980).

[20] Respondent's unsupported and unexplained assertions that the *Williams* decision may not have "any validity whatsoever" and is limited to situations in which the jury "has announced . . . that it is deadlocked" (Opp. 24) are nothing more than wishful thinking. The court in *Loyd* expressly reaffirmed *Williams* and concluded

Finally, respondent's suggestion (Opp. 25 n.17) that nine state courts have agreed with the Fourth Circuit is completely inaccurate. None of those cases involved a misleading instruction. Indeed, in all but one of them there was no jury question and no instruction at all; rather, the sole issue was whether due process requires the court to instruct the jury as a routine matter, and without their request, about the effect of a split decision.[21] That issue is not presented here.

CONCLUSION

For these reasons, and those stated in the Petition, the Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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that it applies regardless of whether the jury is deadlocked. *State v. Loyd*, 459 So. 2d at 502-03.

[21] The only one of the nine decisions even remotely resembling the case at bar is *People v. Kimble*, 749 P.2d 803 (Cal.), *cert. denied*, 109 S. Ct. 188 (1988). In *Kimble* the jury asked a question very similar to the one here. But unlike here, the judge firmly refused to respond, stating: "That is not your province." *Id.* at 822. Whether that answer was "adequate" or not, it plainly was not misleading. In any event, to the extent that *Kimble* conflicts with *Loyd*, as respondent contends (and as the *Kimble* court itself found), that conflict provides one more reason for this Court to grant certiorari.